Supreme Court, U.S.
FILED

04-629 OCT 27 2004

OFFICE OF THE CLERK

No. _____

IN THE
Supreme Court of The United States

PETE K. RAHN, DIRECTOR OF THE MISSOURI DEPARTMENT OF TRANSPORTATION, ET AL.,
Petitioners,

v.

THOMAS ROBB, ET AL.
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

RICH TIEMEYER
Chief Counsel
PAULA LAMBRECHT
Assistant Chief Counsel
Missouri Highways and Transportation Cmsn.
105 West Capitol
Jefferson City, MO 65102
(573) 751-7454

JEREMIAH W. (JAY) NIXON
Attorney General
JAMES R. LAYTON
State Solicitor
ERWIN O. SWITZER, III*
Special Chief Counsel
Laclede Gas Building
720 Olive Street, Suite 2150
St. Louis, Missouri 63101
(314) 340-6816
Counsel for Petitioners

**Counsel of Record*

QUESTIONS PRESENTED FOR REVIEW

Like most states, Missouri operates an "Adopt-A-Highway" program, in which groups that volunteer to pick up trash along the highway receive a "thank you" on a sign the state erects. Missouri rejected a request by the Ku Klux Klan to "adopt" a portion of a Missouri highway. The U.S. Court of Appeals for the Eighth Circuit held that this rejection violated the KKK's First Amendment rights. The questions presented are:

1. Is a state-made, state-erected, state-owned, and state-maintained highway sign acknowledging the assistance of an organization that volunteers to pick up litter the speech of the state, and therefore not subject to First Amendment forum restrictions that would apply were it speech of the organization?

2. In deciding whether a particular organization can participate in a volunteer litter pick-up program, may the state take into account dangers or problems from a sign acknowledging that organization's participation, such as the danger of inducing litter, or endangering highway workers and others who are perceived by passers-by to be organization members?

PARTIES TO THE PROCEEDING

Petitioners (defendants-appellants below) are state officials with the Missouri Highways and Transportation Commission and the Missouri Department of Transportation. The Missouri Highways and Transportation Commission is the entity responsible for appointing the Director of the Department of Transportation. Mo. Rev. Stat. § 226.040.1. The suit originally named Henry Hungerbeeler in his official capacity as Director of Missouri Highways and Transportation Commission. Mr. Hungerbeeler was, at that time, the Director of the Missouri Department of Transportation. The current Director of the Missouri Department of Transportation is Pete K. Rahn. The suit originally named the commissioners on the Missouri Highways and Transportation Commission in their official capacity as follows: S. Lee Kling, Edward D. Douglas, Ollie W. Gates, W.L. Orscheln, William E. Gladden, and Marjorie B. Schramm. Ms. Schramm remains on the Commission. The other defendant-commissioners have been replaced by William P. McKenna, James B. Anderson, Duane S. Michie, Wallace S. Hartsfeld, and Larry D. Webber. The suit originally named Don Hillis in his official capacity as State Maintenance Engineer for the Missouri Department of Transportation. The current State Maintenance Engineer is James Carney.

Respondents (plaintiffs-appellees below) are Thomas Robb, Knights of the Ku Klux Klan (alleged by respondents to be an Arkansas non-profit corporation), Ralph Griffith, and Knights of the Ku Klux Klan Realm of Missouri, Unit 188 (alleged by respondents to be an unincorporated association).

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

A. Background 4

B. The Current Litigation 6

REASONS FOR GRANTING THE WRIT 7

I. There is a split among the circuits as to the appropriate analysis when faced with a question of government speech. 8

A. The state can choose its message and engage in viewpoint discrimination when the state is the speaker. 8

B. An Adopt-A-Highway "thank you" sign is state speech. 14

C. The Eighth Circuit's decision conflicts with the Tenth Circuit in failing to treat a "thank you" sign as government speech. 17

D. The Eighth Circuit's decision conflicts with decisions of the Ninth Circuit and other courts in government speech cases. 19

II. Specific to Adopt-A-Highway programs, there is a conflict between the Eighth and Fifth circuits as to the ability of the state to consider dangerous reactions to speech in a nonpublic forum . 22

III. Government officials, including judicial officials, need the ability to use – and refuse – speech in order to advocate 27

CONCLUSION 29

APPENDIX A-1

TABLE OF AUTHORITIES

Cases

Board of Regents of Univ. of Wis. System v. Southworth, 529 U.S. 217 (2000) 11, 12, 14

Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788 (1985) 23, 24

Cuffley v. Mickes, 208 F.3d 702 (8th Cir. 2000), *cert. denied*, 532 U.S. 903 (2001) 5, 8, 9, 11, 13, 14

Cuffley v. Mickes, 44 F. Supp.2d 1023 (E.D. Mo. 1999) 5

Downs v. Los Angeles Unified School District, 228 F.3d 1003 (9th Cir. 2000) 19

Knights of the Ku Klux Klan v. Curators of the Univ. of Mo., 203 F.3d 1085 (8th Cir.), *cert. denied*, 531 U.S. 814 (2000) 19

Legal Services Corp. v. Velazquez, 531 U.S. 533 (2001) 11

Lewis v. Wilson, 253 F.3d 1077 (8th Cir. 2001), *cert. denied*, 535 U.S. 986 (2002) 23

National Endowment for the Arts v. Finley, 524 U.S. 569 (1998) 12

Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) 23

Perry v. Sindermann, 408 U.S. 593 (1972) 14

Planned Parenthood of South Carolina Inc. v. Rose, 361 F.3d 786 (4th Cir. 2004), *cert. petition filed* 9/24/04, No. 04-429 ..... 20, 22

Regan v. Taxation With Representation, 461 U.S. 540 (1983) 9, 10

Robb v. Hungerbeeler, 281 F. Supp.2d 989 (E.D. Mo. 2003) 6

Robb v. Hungerbeeler, 370 F.3d 735 (8th Cir. 2004) 6, 9, 13, 15, 16, 22, 23, 24, 25

Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819 (1995) 10, 11

Rust v. Sullivan, 500 U.S. 173 (1991) 10, 12, 14

Sons of Confederate Veterans v. Comm'r of Va. Dep't of Motor Vehicles, 288 F.3d 610 (4th Cir. 2002) .. 16, 21

State of Texas v. Knights of the Ku Klux Klan, 58 F.3d 1075 (5th Cir. 1995) 22, 23

Wells v. City and County of Denver, 257 F.3d 1132 (10th Cir.), *cert. denied*, 534 U.S. 997 (2001) 17

Constitutional and Statutory Authorities

Constitution of the United States, Amendment I .. 2

Constitution of the United States, Amendment XIV . 2

28 U.S.C. § 1254(1) 2

28 U.S.C. § 333 27

Mo. Const. art. 4, § 29 4

Mo. Rev. Stat. § 226.040 (2000) 4

Mo. Rev. Stat. § 226.040.1 (2000) ..... ii, 4

Mo. Rev. Stat. § 227.030 (2000) 3, 4

Mo. Rev. Stat. § 227.210(1) (2000) 4

Other Authorities

Mo. Code Regs., tit. 7, § 10-14.010 (2002) 3, 4

Mo. Code Regs., tit. 7, § 10-14.030 (2002) 5

Mo. Code Regs., tit. 7, § 10-14.030 (2)(C) (2002). ... 5

Mo. Code Regs., tit. 7, § 10-14.040 (2002) 5

Mo. Code Regs., tit. 7, § 10-14.040 (3)(B) (2002) .. 15

Mo. Code Regs., tit. 7, § 10-14.040 (3)(F) (2002) .. 25

Mo. Code Regs., tit. 7, § 10-14.050 (2002) 5, 15

Eighth Circuit Holds That Missouri May Not Exclude Knights of the Ku Klux Klan from Public Program, 114 Harv. L. Rev. 660 (December 2000) 8, 9

Norton, *Not for Attribution: Government's Interest in Protecting the Integrity of its Own Expression*, 37 U. Cal. Davis L. Rev. 1317 (June 2004) . . . 8, 15, 16, 17

No. _____

IN THE
Supreme Court of The United States

PETE K. RAHN, DIRECTOR OF THE MISSOURI DEPARTMENT OF TRANSPORTATION, ET AL.,
Petitioners,

v.

THOMAS ROBB, ET AL.
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Petitioners, state officials with the Missouri Highways and Transportation Commission and the Missouri Department of Transportation, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The June 3, 2004 decision of the United States Court of Appeals for the Eighth Circuit, from which petitioners seek review, is reported at 370 F.3d 735 and is published in the Appendix (App.) at A-30. The September 10, 2003 decision of the District Court is reported at 281 F. Supp.2d 989, and is published in the Appendix at A-29. The Eighth Circuit's July 30, 2004, Order denying Petitioners' Petition for Panel Rehearing or, Alternatively, for Rehearing en Banc is published in the Appendix at A-47.

JURISDICTION

The Court of Appeals entered its judgment on June 3, 2004, and denied the petition for rehearing and suggestions for rehearing en banc on July 30, 2004. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Constitution of the United States, Amendment I:

> Congress shall make no law . . . abridging the freedom of speech . . . .

Constitution of the United States, Amendment XIV:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

Mo. Rev. Stat. § 227.030 (2000) (full text in Appendix at A-48)

Mo. Code Regs., tit. 7, § 10-14.010 through § 10-14.060 (2002) (full text in Appendix at A-49)

STATEMENT OF THE CASE

Missouri, like most states, operates an "Adopt-A-Highway" program in which volunteers agree to periodically pick up litter along highways. The state acknowledges the assistance of these groups with signs indicating that a particular portion of the highway has been adopted by the group, thus thanking the group for its assistance. A Ku Klux Klan group applied to adopt a portion of a Missouri highway and to be recognized with the "thank you" sign. Missouri transportation officials rejected the application. Persons associated with the KKK sued the Missouri officials to force them to allow the KKK into the program.

A. Background

The Missouri Highways and Transportation Commission is "empowered and directed to take whatever steps may be necessary to . . . provide for the proper . . . maintenance" of all state and federal highways in Missouri. Mo. Rev. Stat. § 227.030. See also *id.* § 227.210(1); Mo. Const. art. 4, § 29. The Commission appoints the Director of the Missouri Department of Transportation. Mo. Rev. Stat. § 226.040.1 (The officials who are parties herein are referred to collectively as "MoDOT" or "Missouri").

MoDOT has adopted regulations creating an "Adopt-A-Highway" program. The purpose of the program is to use volunteers to reduce litter along the highways – and, in turn to save on maintenance costs. Mo. Code Regs., tit. 7, § 10-14.010 (App. A-49). Prospective adopters must complete an application. *Id.* at

§ 10-14.030 (App. A-53). Adopters agree to pick up litter along the designated portion of a highway at least twice every six months and to put the trash in bags; MoDOT employees pick up the bags. *Id.* at § 10-14.040 (App. A-56-60).

MoDOT employees create, install, and maintain signs at each end of the adopted portion of the highway. The signs, which are designed by MoDOT, contain only the name of the adopter; they cannot include slogans or addresses, nor be profane or sexually suggestive, and are not intended to be a public forum for participants. *Id.* at § 10-14.050 (App. A-61-62).

Representatives of the Ku Klux Klan previously attempted to adopt a portion of a Missouri highway. Missouri rejected the application, leading to litigation. The United States District Court for the Eastern District of Missouri held that denial of the KKK application violated the First Amendment rights of the applicants. *Cuffley v. Mickes*, 44 F. Supp.2d 1023 (E.D. Mo. 1999). The Eighth Circuit affirmed. *Cuffley v. Mickes*, 208 F.3d 702 (8th Cir. 2000), *cert. denied*, 532 U.S. 903 (2001).

MoDOT then amended the definition of eligible adopters in the Adopt-A-Highway regulations to exclude participants for whom state or federal courts had taken judicial notice of a history of violence. Mo. Code Regs., tit. 7, § 10-14.030 (2)(C) (App. A-54).

In April 2001, after the regulation was changed, Ralph Griffith filed a new application seeking to adopt a portion of a highway on behalf of the "Knights of the

Ku Klux Klan Washington Co. MO" (8th Circuit Appendix A-28-29). MoDOT rejected the application, noting that a "judicial notice check" conducted by MoDOT showed that courts had taken judicial notice that the KKK has a history of violence (8th Circuit Appendix A-28-29). The judicial notice check showed 32 cases in which courts took notice of the KKK's violence (8th Circuit Appendix A-234-36).

B. The Current Litigation

Four plaintiffs filed the instant action in July 2001: Griffith; Thomas Robb (alleged by respondents to be the national director of the KKK); Knights of the Ku Klux Klan (alleged by respondents to be an Arkansas non-profit corporation); and Knights of the Ku Klux Klan Realm of Missouri, Unit 188 (alleged by respondents to be an unincorporated association) (collectively the "Ku Klux Klan" or the "KKK").

The KKK named as defendants the Director of the Missouri Department of Transportation, the commissioners of the Missouri Highways and Transportation Commission, and the MoDOT State Maintenance Engineer who signed the letter rejecting the KKK application.

The United States District Court for the Eastern District of Missouri granted summary judgment to the KKK, holding that the KKK's exclusion violated the First Amendment. *Robb v. Hungerbeeler*, 281 F. Supp. 2d 989 (E.D. Mo. 2003) (App. A-2-28). The Eighth Circuit affirmed. *Robb v. Hungerbeeler*, 370 F.3d 735 (8th Cir. 2004) (App. A-30-46).

REASONS FOR GRANTING THE WRIT

This case presents conflicts at both the general and specific levels: generally, regarding the proper analysis when a First Amendment claim involves government speech; and specifically, regarding Adopt-A-Highway programs.

Issues regarding "government speech," percolating in the courts in recent years, have resulted in varying interpretations, with circuit courts commenting on the need for guidance from this Court. The essence of the doctrine is that when the government is the speaker it can engage in viewpoint discrimination–the government can choose its own message when it is speaking. The Eighth Circuit decision is in conflict with other circuits both in (a) rejecting the notion that the government can discriminate in viewpoint when the government is the speaker, and (b) considering a state-made, state-erected, state-owned, and state-maintained sign to be the speech of the entity referenced on the sign rather than the speech of the state.

The Eighth Circuit decision also conflicts with another Adopt-A-Highway decision: that of the Fifth Circuit allowing Texas to refuse the KKK's application to adopt a portion of a highway based on potential hostile reactions to the sign. And it conflicts with other decisions refusing to extend the "no-heckler's veto" principle found in public forum cases to a nonpublic forum (assuming *arguendo* that the Adopt-A-Highway program is a nonpublic forum).

I. There is a split among the circuits as to the appropriate analysis when faced with a question of government speech.

Government speech is a "notoriously knotty area of First Amendment law." Note, *Eighth Circuit Holds That Missouri May Not Exclude Knights of the Ku Klux Klan from Public Program*, 114 Harv. L. Rev. 660 (December 2000), *discussing Cuffley v. Mickes*, 208 F.3d 702 (8th Cir. 2000), *cert. denied*, 532 U.S. 903 (2001). There are fundamental differences between the manner in which the Eighth Circuit has approached government speech, and how it has been dealt with in other circuits. Given the pervasive nature of government communication, and the strong feeling engendered by such speech, those differences merit this Court's attention.

A. The state can choose its message and engage in viewpoint discrimination when the state is the speaker.

The government can, of course, choose the message in its own speech. "[W]hen government speaks on its own behalf, it is free to adopt and deliver whatever message it chooses." Norton, *Not for Attribution: Government's Interest in Protecting the Integrity of its Own Expression*, 37 U. Cal. Davis L. Rev. 1317, 1326 (June 2004). The doctrine that permits the government to transmit one message but decline to transmit another is sometimes referred to as a "nonsubsidization doctrine." That doctrine "provides that the government may selectively subsidize expression of favored ideas and may refuse to finance – that is, 'nonsubsidize' –

disfavored messages." Note, 114 Harv. L. Rev. at 663-64. "Courts . . . have never compelled the government itself to express messages it deems abhorrent." *Id.* at 664.

But here, the Eighth Circuit scarcely discussed the government-speech issue, relying instead on its prior KKK Adopt-A-Highway opinion. 370 F.3d at 744 (App. A-44-45). In that prior opinion, the court held that even if the speaker was the government, the government could not deny a group a benefit–access to the "program"–based on the group's viewpoint. *Cuffley,* 208 F.3d at 706. The Eighth Circuit incorrectly stated as an absolute proposition that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech" with "unconstitutional conditions" on the exercise of a constitutional right. 208 F.3d at 707. The Eighth Circuit did not cite the line of government speech cases distinguishing the "unconstitutional conditions" cases.

The government speech or nonsubsidiziation doctrine is often traced to *Regan v. Taxation With Representation*, 461 U.S. 540 (1983). There a non-profit organization that engaged in lobbying argued that the First Amendment was violated by not providing the same tax benefit (deductibility of contributions) as that given to non-profit organizations that did not engage in lobbying. The non-profit organization argued that the failure to provide the tax benefit was the denial of a government benefit based on the exercise of a constitutional right (lobbying). This Court held that the denial of the tax benefit was not an

"unconstitutional condition" restricting First Amendment rights because the organization was free to engage in lobbying. Congress had "simply chosen not to pay for [the organization's] lobbying." *Id.* at 545-46.

In *Rust v. Sullivan*, 500 U.S. 173 (1991), this Court cited *Regan* in holding that the government can decide not to pay for an organization's speech based on viewpoint. Recipients of federal grants challenged federal regulations that limited the ability of recipients to engage in abortion-related activities. The recipients asserted that this infringed their First Amendment rights by "discriminating based on viewpoint" by requiring pregnancy counselors to provide information on continuing a pregnancy but prohibiting discussion on terminating a pregnancy. This Court held that there was no First Amendment violation because the government can constitutionally "selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way." *Id.* at 192-94.

This Court later reiterated the *Rust* principle in government speech terms, stating: "We recognized that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 833 (1995), *citing Rust*, 500 U.S. at 194. This Court has stated that although *Rust* did not place explicit reliance on the rationale that the activities of the counselors was "governmental speech," this Court has "explained *Rust*

on this understanding." *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 541 (2001).[1]

The Court in *Rosenberger* also began drawing the line between government speech and private speech partially subsidized by the government. Although in *Rosenberger* the Court held that the University of Virginia could not constitutionally refuse to pay for the printing costs of a student newspaper because of its religious viewpoint, the Court did so because the speech involved was *not* that of the University, and the University made express disclaimers to that effect. 515 U.S. at 834-35.

Five years later (and after the Eighth Circuit decided *Cuffley*), this Court reiterated two principles: that the government can say what it wants; and that when the government disclaims speech as its own, viewpoint-neutrality restrictions come into play. In *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217 (2000), a group of students challenged a mandatory student activity fee on the basis that it required them to support programs to which the students objected. The University acknowledged that government speech was not involved, so viewpoint-neutrality was required. But most important for present purposes, this Court recognized that "it seems inevitable that funds raised by the government

---

[1] In that 5-4 decision, the Court did not apply the government speech doctrine in striking a federal restriction on types of litigation by Legal Services Corporation grantees, at least in part because separation-of-powers principles were implicated. 531 U.S. at 546.

will be spent for speech and other expression to advocate and defend its own policies." *Id.* at 229. The Court noted that when the University speaks, the analysis is different, citing *Rust*. *Id.* at 235.

In *Southworth*, the Court explained that there are checks and balances in play when the government is the speaker: "When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position." *Id.* at 235. The government is responsible to the people for its own speech, and the judiciary should not bar viewpoint discrimination by the government.

The government-speech/nonsubsidization doctrine was also discussed in a government grant case: *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998). The majority held that a statute requiring the National Endowment for the Arts to take into consideration "decency and respect" for diverse beliefs and values of the American public in awarding grants was constitutional, in part because the statute did not create an absolute mandate. Because of the way in which the statute was interpreted, the majority did not need to analyze the exact scope of the government speech doctrine.

But Justice Scalia discussed the issue at length in his concurring opinion. He objected to the majority view and explicitly concluded that the statute mandated viewpoint discrimination in the awarding of

grants. More important, he found that viewpoint discrimination to be "perfectly constitutional." *Id.* at 590 (Scalia, J., concurring, joined by Thomas, J.). He stated: "It is the very business of government to favor and disfavor points of view." *Id.* at 598.

Moreover, Justice Souter in dissent (favoring a finding of unconstitutionality) recognized the government's right to engage in viewpoint discrimination when the government is the speaker. Citing the United States' brief, he noted that the Food and Drug Administration can launch an advertising campaign on the subject of smoking, and "it may condemn the habit without also having to show a cowboy taking a puff on the opposite page." *Id.* at 610-11 (Souter, J., dissenting). He dissented because he concluded that the government was not the speaker in this grant award process.

All of these precedents confirm that when the government speaks, the government can pick and choose among the viewpoints it expresses. Logically, then, in any case involving speech and the government, the first question must be, "Whose speech is it?" If the speaker is the government, the choice to send one message but not another will normally be affirmed.

Here, the Eighth Circuit held that the question, "Whose speech is it?," does not require an answer. According to the Eighth Circuit, Missouri had to post the KKK's name on a state sign because it didn't matter, under the First Amendment, "whether or not the Klan" – and thus whether or not the government – "was 'speaking.'" 370 F.3d at 744, *quoting Cuffley*, 208 F.3d

at 706 n.3 (App. A-45). In reaching that conclusion, the Eighth Circuit did not discuss the line of government speech cases – neither here, nor in *Cuffley*.

The Eighth Circuit turned instead to *Perry v. Sindermann*, 408 U.S. 593 (1972), *cited at* 208 F.3d at 707. There, this Court held that nonrenewal of a non-tenured professor's contract may not be a reprisal for the exercise of his First Amendment rights (legislative testimony). But that does not eradicate the government speech doctrine; the alleged retaliation came in response to the professor's own speech, not government speech. In fact, in *Southworth*, the Court expressly noted that when the University (*i.e.*, the government) itself speaks, including through its faculty, the *Rust* government speech doctrine applies. 529 U.S. at 234-35.

As discussed below, the answer to the question, "Whose speech is it?," does matter, according to other circuit courts of appeals. And, according to the rationale adopted by those courts, putting the name of the KKK on a sign erected by the state on state property would be government speech.

B. An Adopt-A-Highway "thank you" sign is state speech.

That a government-approved, -made, -erected, and -maintained sign on a public right-of-way constitutes government speech would seem obvious, but for the Eighth Circuit's analysis. After concluding that the answer to the question did not matter, that court held alternatively that the Adopt-A-Highway program

involves "some degree of private 'speech,'" and that such a "degree of private 'speech'" removes the sign from government speech analysis. 370 F.3d at 744 (App. A-45).

An Adopt-A-Highway sign is, in effect, a "thank you" from the state to the group picking up litter. The sign is erected and maintained at state expense on state property. Mo. Code Regs., tit. 7, § 10-14.040 (3)(B) (App. A-59; Eighth Circuit Joint Appendix A-106). The only words permitted on the sign are the name of the adopter; slogans or addresses are prohibited. Mo. Code Regs., tit. 7, § 10-14.050 (App. A-61). A state's Adopt-A-Highway signs either explicitly or implicitly thank private donors or volunteers. But the donors/volunteers "are not the 'literal' speakers when the government makes, installs, and maintains the signs." Norton, 37 U. Cal. Davis L. Rev. at 1335. Although the Eighth Circuit suggests that the speech is joint speech, "truly joint speech requires that both parties agree to the joint expression." *Id.* at 1336. The sign here is no more "joint speech" than is a thank you note. Such a note is the speech of the person giving thanks, not that of the person being thanked.

The Eighth Circuit did not take issue with the fact that the Adopt-A-Highway sign is state owned and created. The Eighth Circuit instead suggested that the question of whether something is government speech is somehow affected by the motive of the person named by the state – here, the person being thanked. It may well be true that adopters participate in the program "so that they [the adopters] can express a particular message: their solidarity with the community and their

wish to become known as promoters of clean highways." 370 F.3d at 745 (App. A-46). Where the Eighth Circuit moved into disputed territory was when it concluded that when "an adopter speaks through the signs by choosing to undertake the program's obligations in exchange for the signs' announcement to the community that it [the adopter] is a highway adopter" (370 F.3d at 745), the state's signs are no longer government speech. The Eighth Circuit's legal conclusion that the state's sign constitutes the KKK's speech conflicts with the law of other circuits.

And it ignores a critical consideration: that the sign is the state's speech is the entire point of the KKK's application. The KKK could buy billboard advertisements conveying the KKK's "solidarity with the community and their wish to become known as promoters of clean highways." But the KKK understands that its message is more powerful when the state conveys it. As Professor Norton observed in a similar circumstance, the reason why a group such as the Sons of Confederate Veterans seeks to have its name and logo put on a license plate when there are readily available alternatives to create its own signs is that "those private speakers seek the added emphatic or symbolic values of the government's imprimatur for their speech." Norton, 37 U. Cal. Davis L. Rev. at 1338, *referring to and disagreeing with Sons of Confederate Veterans v. Comm'r of Va. Dep't of Motor Vehicles*, 288 F.3d 610 (4th Cir. 2002)(state could not refuse to issue specialized license plates created upon request of a group based upon objection to the organization's message; court found that private speech was involved).

Again, the KKK is seeking to participate in the Adopt-A-Highway program because the speech in question is that of the state. Missouri, on the other hand, is trying to avoid giving motorists the mistaken impression that the state has anything good to say about a horrific, racist group. "First Amendment values are not frustrated by government efforts to protect its expression that deprive a private speaker of only the opportunity to speak in a setting that mistakenly conveys the government's endorsement of his or her speech." Norton, 37 U. Cal. Davis L. Rev. at 1346. And it is the Eighth Circuit's conclusion that the KKK's motive removes this from government speech law that creates the conflict with other circuits.

C. The Eighth Circuit's decision conflicts with the Tenth Circuit in failing to treat a "thank you" sign as government speech.

The most stark conflict arises between the Eighth Circuit and the Tenth, which has also addressed a government "thank you" sign. *Wells v. City and County of Denver*, 257 F.3d 1132 (10th Cir.), *cert. denied*, 534 U.S. 997 (2001). In *Wells*, the City of Denver erected a winter holiday display (which included snowmen, Christmas trees, and a creche) on the steps of the City's government building. The City, using public funds, erected a sign listing six corporate sponsors. One of the plaintiffs, the Freedom From Religion Foundation, requested permission to put its own sign in the display criticizing Denver's display. Denver refused the request.

Unlike the Eighth Circuit, the Tenth insisted on answering the question, "Whose Speech Is it?" The Tenth Circuit did not suggest that the obvious answer – the government – could be wrong merely because a corporate sponsor had some motive for getting its name on the sign. *See id.* at 1139-40. The Tenth Circuit concluded that the sign constituted government speech based on three factors: (1) the central purpose of the sign was to thank the sponsors, which was not changed by the fact that the sponsors received a benefit from that thank-you (good will); (2) the government "built, paid for, and erected the sign," making it the literal speaker; and (3) the government had ultimate responsibility for the sign, as shown by the fact that it was on secured government property. *Id.* at 1141-42. Had the same factors been applied to the Adopt-A-Highway sign here, it would have been obvious that it was government speech.

The Tenth Circuit majority also discussed the issue of the viewers' perception as to the identity of the speaker. Although the majority was not convinced that this was relevant, it held that an objectively reasonable viewer would realize that a sign on government property with a generic graphic style and message was the speech of the government and not of the sponsors who were implicitly being thanked (*id.* at 1142-43) – factors that apply here. The Tenth Circuit held, in a 2-1 decision, that Denver as the speaker could say what it wanted to say and could exclude speakers it wanted to

exclude because it disliked the message. *Id.* at 1143-44.[2]

Besides reaching a conclusion that conflicts with that of its sister circuit, the Tenth Circuit made an observation that underscores the need for granting certiorari here: the Supreme Court has to date "provided very little guidance as to what constitutes government speech." *Id.* at 1140.[3]

D. The Eighth Circuit's decision conflicts with decisions of the Ninth Circuit and other courts in government speech cases.

Moving beyond the "thank you" sign context, the Eighth Circuit's holding and rationale also conflict with decisions in other circuits.

In *Downs v. Los Angeles Unified School District*, 228 F.3d 1003 (9th Cir. 2000), a teacher sued for the right to post on a school bulletin board information

---

[2] Ironically, the Tenth Circuit relied in large part on an Eighth Circuit case recognizing the right of a state university to refuse to allow the Ku Klux Klan to sponsor a radio program. *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085 (8th Cir.), *cert. denied*, 531 U.S. 814 (2000).

[3] Government speech issues also arise in *Veneman v. Livestock Marketing*, No. 03-1164 (set for argument Dec. 8, 2004). But given the questions on which certiorari was granted, it seems unlikely that the case will provide much guidance in this important area.

regarding sexual orientation expressing a point of view different from that of the school board. Like the Tenth Circuit, the Ninth directly confronted the "Whose Speech Is It?" question. The Ninth Circuit held that because the bulletin board was the property and responsibility of the school district, the school district did not purport to be creating a public forum, and the district did not disclaim responsibility for the content of the bulletin boards, the speech was that of the government. *Id.* at 1012. And because the government was the speaker, it could discriminate in viewpoint. It could favor tolerance and restrict speech to the contrary on the school district's own bulletin board. *Id.* at 1013-14. The Eighth Circuit, of course, has now held that the State of Missouri cannot reject a message of intolerance on its Adopt-A-Highway signs.

More urgent is the restriction the Eighth Circuit's decision as to highway signs puts on states that issue personalized or speciality license plates. The financial benefits to the states from personalized vehicle license plates, as well as state efforts to use those plates to send particular, state-approved or at least state-tolerated messages, is leading to more and more "cause" plates. That, in turn, will inevitably lead to disputes concerning the appropriateness of inserting messages onto plates that are produced and regulated by and bear the name of the state.

The government speech doctrine is a key issue in another petition for certiorari before this Court dealing with such plates, *Planned Parenthood of South Carolina Inc. v. Rose*, 361 F.3d 786 (4th Cir. 2004), *cert. petition filed* 9/24/04, No. 04-429. Planned Parenthood

challenged a South Carolina law establishing a "speciality" license plate imprinted with the words "Choose Life." There is no comparable plate with a pro-choice message. Like the Tenth and Ninth Circuits, the Fourth recognized that the first question to answer was whether the speech on the license plate was that of the government or a private speaker (*id.* at 792) – the "whose speech" question that the Eighth Circuit deemed unimportant here. And like the Tenth Circuit, the Fourth noted that the Supreme Court has not set out a clear standard for determining when government speech is involved. *Id.*

The Fourth Circuit sided with the Eighth – and contrary to the Tenth and Ninth – on the question of whether a mixture of government speech with private motivation removes the case from the realm of government speech precedents. Thus the court held that a specialized plate is both government and private speech, and that the state was restricted in discriminating based on viewpoint when it created one "cause" plate but not another. *Id.* at 795-99. But one judge concurred because he felt constrained by prior Fourth Circuit precedent. *Id.* at 801, citing *Sons of Confederate Veterans*, 288 F.3d 610. And there were five votes for a rehearing en banc (373 F.3d 580 (2004)) that could have vacated the precedent, thus opening the door to a decision that conflicted with that of the Eighth Circuit not just in terms of the importance given to the "Whose speech" question, but also whether the answer changes based on a degree of private choice.

While Missouri takes no position on that petition for certiorari, and the Adopt-A-Highway sign is more

clearly government speech than the license plate in *Planned Parenthood*, the Fourth Circuit opinion shows the division in views on the government speech doctrine and the benefit of granting certiorari here.

II. Specific to Adopt-A-Highway programs, there is a conflict between the Eighth and Fifth Circuits as to the ability of the state to consider dangerous reactions to speech in a nonpublic forum.

Even assuming that there is speech of the KKK involved and viewpoint discrimination is impermissible, the Eighth Circuit analysis conflicts with that of the Fifth Circuit in another KKK Adopt-A-Highway case. The Fifth Circuit allowed Texas to keep the KKK out of the program because of the reaction to the "thank you" sign: the potential for intimidation and conflict. *State of Texas v. Knights of the Ku Klux Klan*, 58 F.3d 1075 (5th Cir. 1995). The Eighth Circuit, on the other hand, adopted a unique rule for nonpublic forum cases: it held that the state may not suppress speech because of potential responses of recipients of the speech. This limitation on state power to restrict speech is generally found in the public forum context. The Fifth Circuit and this Court have rejected that rule for nonpublic fora.

The Eighth Circuit held that Missouri's Adopt-A-Highway program is a "forum," and assumed the correctness of the district court's finding that the program is a nonpublic forum. 370 F.3d at 743 (App. A-43). In a nonpublic forum, speech restrictions are permissible if the restrictions are (1) reasonable and (2) viewpoint-

neutral. *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 806 (1985); *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983). Most relevant for purposes of this petition, the Eighth Circuit held that public safety concerns, such as reactions to KKK's speech, could not be considered. 370 F.3d at 743 (App. A-42). The Eighth Circuit's rationale was that "the first amendment knows no heckler's veto." *Id., citing Lewis v. Wilson*, 253 F.3d 1077, 1081-82 (8th Cir. 2001), *cert. denied,* 535 U.S. 986 (2002) (state could not consider dangers of the effect of "road rage" in denying an application for a racist license plate).

Neither in this case nor in *Lewis v. Wilson* did the Eighth Circuit cite a nonpublic forum case (other than *Lewis*) for the no-heckler's veto proposition. In fact, we have not found any case from any jurisdiction outside the Eighth Circuit holding that reactions to speech cannot be considered in a nonpublic forum.

That holding stands in stark contrast to that of the Fifth Circuit in *State of Texas v. Knights of the Ku Klux Klan*. There, the court considered the refusal of Texas to allow the Ku Klux Klan to "adopt" a highway near a housing project that was being desegregated. Participation would have meant the state would erect a sign along that portion of the highway thanking the KKK for picking up litter along that stretch of highway. The Fifth Circuit held that the KKK sign would "create unreasonable conflict" and "invite strife." 58 F.3d at 1079. The Fifth Circuit further noted: "The State may also reasonably conclude that the adoption by the Klan of a section of highway . . . would frustrate

the use of the State's public highways . . . [P]roject residents and their family members would be reluctant to use highways adopted by the Klan, particularly if the Klan was present gathering trash." *Id.* at 1080. The Fifth Circuit held that those concerns were reasonable and were viewpoint-neutral because the concerns "result[] from the foreseeable impact of Program participation by the Klan, given the past conduct of the Klan, upon the peace and privacy of the project residents and use of the State's highways." *Id.* at 1081. Thus, the Fifth Circuit allowed a "heckler's veto" in a nonpublic forum and considered safety and reactions to the adoption of a part of a highway by the KKK.

That conclusion was consistent with this Court's leading nonpublic forum case, not cited by the Eighth Circuit, where the Court expressly stated that considering reactions to speech is permissible in a nonpublic forum: "Although the avoidance of controversy is not a valid ground for restricting speech in a public forum, a nonpublic forum by definition is not dedicated to general debate or the free exchange of ideas. The First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose." *Cornelius*, 473 U.S. at 811. This Court held that excluding political advocacy organizations from participation in the government's charitable fundraising drive to avoid controversy is reasonable. *Id.* at 813.

Here and in Texas, of course, the problem faced by the states was not merely controversy. There was a real safety concern. The Eighth Circuit hardly needed proof of the deplorable, sadistic, and reprehensible

conduct of the KKK – a history that moves it far beyond "controversial" (370 F.3d at 740, App. A-37). The Eighth Circuit, like the Fifth, could and should have considered the reactions that could easily follow from a KKK Adopt-A-Highway sign. The Fifth Circuit referred to the deterrent effect on highway use of a KKK sign. Moreover, given the KKK's reputation as a hate group, it is reasonable to anticipate that taunts, jeers, insults, or objects would be hurled at KKK members picking up trash near the road. This conduct could reasonably be anticipated to lead to the following:

1. State workers cleaning the KKK stretch of highway would be in danger. Even though the highway is "adopted" by the KKK, state workers still pick up the trash bags and would have to pick up the trash if the adopter does not do so. Mo. Code Regs., tit. 7, § 10-14.040 (3)(F) (App. A-60). But many motorists do not realize that the persons picking up trash near the KKK sign could be state workers. They could be exposed to taunts, rock-throwing, gunshots, or worse.

2. If KKK members did show up to pick up the trash, they would be exposed to the same dangers. Even if the KKK members are willing to expose themselves to the risk of attacks, the state acts reasonably in not wanting its volunteers to be assaulted. Attacks on volunteers would likely deter other organizations from volunteering and thereby impede the program.

3. Taunts or attacks could reasonably be expected to lead to responses from the persons picking up the litter. Those reactions might be return rock-throwing or other provocative acts. The dangers of a

violent reaction are heightened when the persons being taunted or attacked are members of an organization with a long history of violence.

4. Even when no one was picking up trash, there would be problems with KKK participation in the program. Some passers-by would intentionally dump trash along the KKK stretch of highway when no one is picking up litter, thinking that they were creating work for the KKK members. Thus, the KKK's involvement could lead to *more* trash along the highway, completely defeating the purpose of the program.[4]

The Eighth Circuit stands alone in barring the consideration of reactions to speech in a nonpublic forum. Transportation workers and other persons in the Eighth Circuit states should not be exposed to the dangers and problems associated with KKK adoption of a highway. This Court should grant certiorari on this issue of great importance in the Eighth Circuit.

---

[4] In the lower courts the MoDOT officials specifically argued that taunts, jeers, or insults hurled at the KKK members picking up trash could lead to citizens being injured by a violent reaction from the KKK members, and that highway use would be deterred (8th Circuit Appellant's Br. 34-35; Joint Appendix A-255-57). The other examples described in the text are reasonably anticipated, though not specifically mentioned in the proceedings below.

III. Government officials, including judicial officials, need the ability to use – and refuse – speech in order to advocate.

The need for further interpretation by this Court of the government speech doctrine can be seen not only from the case law, but also by considering everyday examples of government speech where Eighth Circuit's rationale would become problematic. A few illustrations from the judicial realm make the point.

1. The federal circuit courts hold statutorily authorized judicial conferences considering "means of improving the administration of justice," and courts may allow participation by members of the bar of the circuit. 28 U.S.C. § 333. Typically a circuit court or chief judge will appoint a program committee and seminars will be held. The courts engage in viewpoint discrimination in the selection of the program committee, speakers, and seminar sessions. Lawyers who advocate incivility in litigation are not chosen as speakers or as members of the program committee. As a result, persons with that viewpoint will not receive the implicit "thank you" in the "acknowledgments" section of the program. The courts properly skew the program toward a viewpoint that in the judges' view advances the administration of justice, and they discriminate in the selection of who receives the benefit of participating in the program. There is no First Amendment right of a lawyer with a viewpoint unpopular in the judiciary to participate and receive a public "thank you" from the courts, even when the unpopular views are far less extreme than those of the KKK.

2. Federal courts host and organize portrait-hanging ceremonies or memorial services at which non-court employees participate in the ceremony by offering comments on the judge's career. A review of transcripts of those ceremonies published in the Federal Reporters makes clear that the courts engage in viewpoint discrimination in deciding who may speak at these events: serious negative comments are not welcome in the program. Nor will a person who thought that the judge was incompetent receive an implicit "thank you" in the printed brochure on the ceremony. Of course, this is perfectly constitutional. The courts should not have to send a message of disrespect at such ceremonies where the judiciary, through its invitees, speaks.

3. Nearly every federal courthouse has forms of public art or engravings that promote a viewpoint such as the belief in government by law rather than might, or of equality of all persons under the law. The government may hear from artists who want to have art displayed that conveys the message that the American legal system is ineffective or corrupt. We have not seen such art in any federal courthouse, and the government has done nothing wrong in engaging in that viewpoint discrimination. Groups advocating the theme "unequal justice" are not entitled to have the courts put their message on signs in courthouses next to the Bill of Rights.

Similar examples abound throughout government. The government chooses to honor Martin Luther King by naming a highway after him without having to designate a "David Duke" highway. The ramifications

of ignoring or misapplying the government speech doctrine so as to preclude such choices, as the Eighth Circuit demands, are profound.

CONCLUSION

For the foregoing reasons, petitioners pray the court grant the petition for writ of certiorari.

RICH TIEMEYER
Chief Counsel
PAULA LAMBRECHT
Assistant Chief Counsel
Missouri Highways and
Transportation Cmsn.
105 West Capitol
Jefferson City, MO 65102
(573) 751-7454

JEREMIAH W. (JAY) NIXON
Attorney General
JAMES R. LAYTON
State Solicitor
ERWIN O. SWITZER, III*
Special Chief Counsel
Laclede Gas Building
720 Olive Street, Suite 2150
St. Louis, Missouri 63101
(314) 340-6816
Counsel for Petitioners

**Counsel of Record*

No. _____

IN THE
Supreme Court of The United States

PETE K. RAHN, DIRECTOR OF THE MISSOURI DEPARTMENT OF TRANSPORTATION, ET AL.,
Petitioners,

v.

THOMAS ROBB, ET AL.
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

APPENDIX

RICH TIEMEYER
Chief Counsel
PAULA LAMBRECHT
Assistant Chief Counsel
Missouri Highways and Transportation Cmsn.
105 West Capitol
Jefferson City, MO 65102
(573) 751-7454

JEREMIAH W. (JAY) NIXON
Attorney General
JAMES R. LAYTON
State Solicitor
ERWIN O. SWITZER, III*
Special Chief Counsel
Laclede Gas Building
720 Olive Street, Suite 2150
St. Louis, MO 63101
(314) 340-6816
Counsel for Petitioners

**Counsel of Record*

TABLE OF CONTENTS

Thomas Robb, et al., v. Henry Hungerbeeler, et al., United States District Court, Eastern District, Eastern Division, Case No. 4:01CV1133 CDP, Memorandum and Order of the Eastern District A-2

Thomas Robb, et al., v. Henry Hungerbeeler, et al., United States District Court, Eastern District, Eastern Division, Case No. 4:01CV1133 CDP, Declaratory Judgment of the Eastern District A-29

Thomas Robb, et al., v. Henry Hungerbeeler, et al., United States Court of Appeals for the 8th Circuit, Case No. 03-3547, Opinion of the 8th Circuit A-30

Thomas Robb, et al., v. Henry Hungerbeeler, et al., United States Court of Appeals for the 8th Circuit, Case No. 03-3547, Order Denying Petition for Rehearing and for Rehearing En Banc A-47

Full Text of Missouri Statute Authorizing Highway System Regulations–Mo. Rev. Stat. § 227.030 (2000) A-48

Full Text of Missouri's Adopt-A-Highway Regulations–Mo. Code Regs., tit. 7, § 10-14.010 (2002) A-49

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

THOMAS ROBB, et al.,	)	
	)	
- Plaintiffs,	)	
	)	
v.	)	Case No. 4:01CV1133CDP
	)	
	)	
HENRY HUNGERBEELER, et al.,)		
	)	
Defendants.	)	

MEMORANDUM AND ORDER

This case involves the state's second refusal to allow the Ku Klux Klan to participate in Missouri's Adopt-A-Highway program. In an earlier case the Court of Appeals held that the Missouri Highway and Transportation Commission had unconstitutionally denied the Klan's application to the program based on the Klan's beliefs and advocacy. After that ruling, the Commission adopted new sate regulations, which became effective in January of 2001. The Klan applied again, and, citing the new regulations, the Commission again denied the application. The Klan brought this § 1983 action seeking declaratory judgment and injunctive relief.

The parties have filed cross-motions for summary judgment. After careful consideration of the facts, I will grant the Klan's motion for summary judgment. The undisputed facts show that Commission's reasons

for denying the Klan's application are unconstitutional. The Court of Appeals has already ruled that the state cannot deny the application because the Klan discriminates on the basis of race, and that decision is binding in this case. The state's other asserted justification – that it can deny an application where courts have previously taken judicial notice that the applicant has a history of violence – is not reasonable in light of the purpose of the forum. I will therefore enter a declaratory judgment in favor of the Klan.

FACTS

The Missouri Highways and Transportation Commission is responsible for the locations, design, and maintenance of all highways in the State of Missouri. In furtherance of its continuing maintenance of the state highway system, the Commission established the Adopt-A-Highway program, which is a voluntary program enacted to "reduce litter along the highways, enhance the environment and beautify Missouri's roadsides." Mo. Code Regs. Ann. tit. 7, § 10-14.010(2). Participants in the program conduct activities to help control litter along Missouri highway rights-of-way, which minimizes the expenditures of public funds for litter control.

Civic and nonprofit organizations, commercial and private enterprises, and individuals may submit an application, on a form provided by the Commission, to adopt a designated portion of a state highway. Id. at § 10-14.030. In return, the participants receive recognition for efforts through a sign acknowledge the identity of the individual or group providing the work. The Commission bears the costs of the sign production, erection, and maintenance. The sign, which is erected

on the adopted section of the highway, lists only the name of the program participant. The Commission does not allow any symbols, logos, advertising, or other statements to be placed on signs. Id. at § 10-14.050.

If an application is approved by the Commission, the adopted or the adopter's representative executes a written agreement with the Commission setting forth each party's responsibilities. Id. at § 10-14.040. In this contract, the adopter agrees to "[i]ndemnify and hold harmless the commission and department and their officers, employees and agents from any claim, lawsuit or liability which may arise from the adopter's participation in the program." Id. at § 10-14.040(2)(K). The Commission is responsible for determining the specific section of highway right-of-way that is to be adopted. The Commissions also provides the adopter with safety training and safety equipment, and agrees to remove and dispose of filled trash bags along the sides on the highway.

In March of 2000, the United States Court of Appeals for the Eighth Circuit held that the Commission could not exclude the knights of the Ku Klux Klan from its Adopt-A-Highway program solely on the basis of the Klan's viewpoint. Cuffley v. Mickes, 208 F.2d 702, 707 (8th Cir. 2000).[1] After this decision, the Commission promulgated new program regulations with

---

[1] The Court of Appeals had dismissed an earlier action for lack of ripeness because the state had not, at that time, denied the Klan's first application. See State v. Cuffley, 112 F3d 1332 (8th Cir. 1997).

respect to eligible adopters, which because effective on January 30, 2001. These regulations provide in part:

> (1) The adopter or adopter representative of a group who desires to participate in the program shall submit an application to the commission on a form provided by the commission.
>
> (2) Eligible Adopters. Eligible adopters include civic and nonprofit organizations, commercial and private enterprises and individuals: 1) who have not been convicted of, or pled guilty or no contest to, a violent criminal activity, except as provided below; 2) whose participants have not been convicted of, or pled guilty or no contest to, a violent criminal activity, except as provided below; 3) for whom state or federal courts have not taken judicial notice of a history of violence; or 4) who do not deny membership on the basis of race, color, or national origin. Any individual adopter or participant may be eligible ten (10) years after the completion of incarceration, probation or parole. Applicants who do not meet the eligibility requirement will be denied participation in the program. The commission reserves the right to limit the number of adoptions for a single group.
>
> (3) Acceptance of Application. The Commission will have sole responsibility in determining whether an application is

> rejected or accepted and determining what highway will or will not be eligible for adoption.
>
> * * *
>
> (c) The adopter representative will certify on the application form that the group or organization does not deny membership on the basis of race, color, or national origin.

Mo. Code Reg. Ann. tit. 7, § 10-14.030(2).

On April 19, 2001, Ralph L. Griffith, the Unit Coordinator for the Klan, Realm of Missouri, Unit 188, filed an application on behalf of the Klan to participate in the Adopt-A-Highway program on a one-half mile long stretch of Route 21 in Washington County, Missouri. Don Hillis, a Commission state maintenance engineer, reviewed the Klan's application under the procedures set forth under the new regulations. In a May 18, 2001 letter to Griffith, the Commission notified the Klan that its application was denied, stating:

> Under the Adopt-A-Highway rules, a group or organization is eligible to participate in the Adopt-A-Highway program only if it meets the qualification requirements set forth in the state regulations, specifically 7 CSR 10-14.030. Those requirements provide that no group or organization may participate in the program if state or federal courts have taken judicial notice of a history of violence by the group or organization or if the group

or organization denies membership on the basis of race, color, or national origin.

Missouri undertakes judicial notice checks of every applicant seeking to participate in the program. Also, applicant groups or organizations are asked on the application form whether they deny membership on the basis of race, color, or national origin. Our judicial notice check confirms that courts have taken judicial notice of a history of violence by the Knights of the Ku Klux Klan. Furthermore, your application states that your group denies membership on the basis of race, color or national origin.

I recognize that litigation with Michael Cuffley and the Knights of the Ku Klux Klan, Realm of Missouri recently concluded. In the course of that litigation, and as a result of court rulings that were critical of Missouri Department of Transportation's rules and process at the time, MoDOT responded by revising its rules to ensure they contain eligibility criteria that are viewpoint neutral, that can be applied in an objective, even-handed way, and that ensure that Missouri's voluntary litter control program is conducted consistent with legal obligations and in the public interest.

The Knights of the Ku Klux Klan do not meet the program's eligibility

requirements under these rules. Therefore, your application is denied.

On July 19, 2001, Griffith and Thomas Robb, the National Director of the Klan, filed suit seeking declaratory judgment and injunctive relief. The Klan argues that the Commission unconstitutionally denied its application based on the 2001 regulations. The Klan named as defendants Hillis, Commission Director Henry Hungerbeeler, and the individual Commissioners. The parties have filed cross-motions for summary judgment.

SUMMARY JUDGMENT STANDARD

To determine whether to grant summary judgment, I must view the facts and inferences from the facts in the light most favorable to the nonmoving party. Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). The moving party has the burden to establish both the absence of the genuine issue of material fact and that they are entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Once the moving party has met this burden, the nonmoving party may not rest on the allegations in its pleadings but by affidavit or other evidence must set forth specific facts showing that a genuine issue of material fact exists. See Fed. R. Civ. P. 56(e).

At the summary judgment stage, I will not weigh the evidence and decide the truth of the matter, but rather must only determine if there is a genuine issue for trial. Anderson, 477 U.S. at 249. Rule 56(c) of the Federal Rules of Civil Procedure mandates entry

of summary judgment against a party, if after adequate time for discovery, that party fails to make a showing sufficient to establish the existence of an essential element of the case that the party will have the burden of proving at trial. Celotex, 477 U.S. at 322-23.

DISCUSSION

The Klan advances five arguments in support of its motion for summary judgment: (1) the Commission should be collaterally estopped from relitigating the issues in this case; (2) the Klan's membership requirements are protected by the First and Fourteenth Amendment freedom of association; (3) the Commission impermissibly denied the Klan's access to a public forum; (4) the Commission's judicial notice claim that the Klan has a history of violence is without evidentiary foundation and is therefore pretextual; and (5) the Commission's judicial notice claim is based on impermissible guilt by association.

In its motion for summary judgment, the Commission argues that: (1) permitting the Klan to participate in the program would violate the equal protection clause because the Klan's conduct would constitute state action; (2) allowing the Klan to adopt a highway right-of-way would violate Title VI and would cause Missouri to lose federal highway finding; (3) the Commission should be able to control its own speech on highway signs; and (4) the Commission's reasons for rejecting the Klan's application are constitutional under both the public and non-public forum analysis.

In deciding whether to grant summary judgment, I will address the two parts of the new regulations on which the Commission relied in denying the Klan's application. The Commission stated that the Klan's application was denied because: (1) the Klan is ineligible because only organizations who do not deny membership to individuals on the basis of race, color, or national origin are eligible, and (2) the Klan is ineligible because the Commission's judicial notice check indicates that federal and state courts have taken judicial notice of the Klan's history of violence.

Discriminatory Membership Regulation

In Cuffley the Court of Appeals help that the Commission had unconstitutionally rejected the Klan's application because of its racial discrimination in membership. Citing its new regulations, the Commission has again denied the application for the same reason. The Klan argues that the Commission should be collaterally estopped from relitigating this issue because the Eighth Circuit has already addressed this reason and found it unconstitutional. The Commission argues that its new regulations make the issues different.

"The doctrine of collateral estoppel, or issue preclusion, provides that when an issue of ultimate fact has been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in another lawsuit." United States v. Brekke, 97F.3d 1043, 1049 (8th Cir. 1996) (citing Ashe v. Swenson, 397 U.S. 436, 443 (1970)). Collateral estoppel is appropriate when: (1) the issue sought to be precluded is identical to the issue previously decided by the court; (2) the prior action resulted in a final

adjudication on the merits; (3) the party sought to be estopped was either a party or in privity with a party to the prior action; and (4) the party sought to be estopped was given a full and fair opportunity to be heard on the issues in the prior action. Canady v. Allstate Ins. Co., 282 F.3d 1005, 1016 (8th Cir. 2002). The party asserting collateral estoppel bears the burden of proving that a prior decision satisfies these four elements. Berger Transfer & Storage v. Central States, Southeast and Southwest Areas Pension Fund, 85 F.3d 1374, 1377 (8th Cir. 1996).

Collateral estoppel is referred to as "offensive" or "nonmutual" when the parties are not identical. See Parklaine Hosiery Co. v. Shore, 439 U.S. 322, 329 (1979). In such a situation, collateral estoppel can still apply so long as the party against whom it is asserted has a full and fair opportunity to litigate the issue. Id. The decision to allow offensive collateral estoppel is left to the broad discretion of the district court, because issues of fairness may arise in the offensive situation that are not present where the parties are identical. Id. at 330-331; Aetna Cas. and Sur. Co. v. General Dynamics Corp., 968 F.2d 707, 711 (8th Cir. 1992).

The plaintiffs here are Thomas Robb, the National Director of the Klan, and Ralph L. Griffith, who actually filed the application with the Adopt-A-Highway program, and who identifies himself as the Unit Coordinator for the Klan, Realm of Missouri, Unit 188. In both of the earlier Cuffley cases the plaintiff was Michael Cuffley, who identified himself as the "Unit Recruiter" of the Klan. The Missouri Highways and Transportation Commission, of course, is the same. The state defendant has pointed to no difference in the

cases that would make its incentive to litigate the prior cases any different from its incentive to litigate this one, and in fact, the record of the cases indicates that the sate has litigated all three cases forcefully and similarly.

In Cuffley, the Eighth Circuit held that the Commission unconstitutionally denied the Klan's application based on the Klan's racial superiority beliefs and advocacy. 208 F.3d at 707. In reaching this conclusion, the court rejected the Commission's purported reasons for denying the application, one of which was the Klan's discriminatory membership criteria. Under the 1995 regulation, the applicant "must not discriminate and the basis of race, religion, color, national origin or disability. Such discrimination disqualifies the applicant from participation in the program." Id. at 708.

The Eighth Circuit held that this reason for denying the application constituted an unconstitutional condition of the Klan's participation in the Adopt-A-Highway program. The court noted that the Commission "simply cannot condition participation in its highway adoption program on the manner in which a group exercises its constitutionally protected freedom of association." Id. at 709. "Requiring the Klan essentially to alter is message of racial superiority and segregation by accepting individuals of other races, religions, colors, and national origins in order to adopt a highway would censor its message and inhibit its constitutionally protected conduct." Id. at 708.

Under the 2001 regulations, an eligible adopter is one who does "not deny membership on the basis of

race, color, or national origin." The Commission attempts to distinguish this somewhat new language by arguing that Griffith admitted on the Adopt-A-Highway program form that the Klan, in fact, discriminates in its membership. I fail to see any material or substantial difference between the two regulations, other than the deletion of disability and religion from the list. The 2001 regulations still allow the Commission to reject those applicants who discriminate in their membership criteria. The Eighth Circuit has conclusively held that this violates the Klan's First Amendment right to freedom of association.

The Supreme Court has stated that the "forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." Boy Scouts of America v. Dale, 530 U.S. 640, 648 (2000) (citing New York State Club Assn., Inc. v. City of New York, 487 U.S. 1, 13 (1988)). "Freedom of association. . .plainly presupposes a freedom not to associate." Roberts v. United State Jaycees, 468 U.S. 609, 622 (1984). The Commission's new regulation contravenes this freedom by essentially requiring the Klan to alter its message of racial superiority and segregation by accepting individuals of other races, colors, and national origins.

Although not mentioned in its letter, but nonetheless related to the discriminatory membership regulation, the Commission also argues that permitting the Klan to participate in the Adopt-A-Highway program would violate Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and would cause Missouri

to lose federal highway funding. The Eighth Circuit addressed and rejected this very same argument in Cuffley as follows:

> The State's third purported reason for denying the Klan's application is that allowing the Klan to participate in the Adopt-A-Highway program would violate Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1994), and could cause the State to lose federal highway funding. Under Title VI, "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Id; see also id. 2000d-4a (defining "program or activity" to include all operations of State government departments); id. § 2000d-1 (authorizing termination of federal funding for programs that violate Title VI).
>
> Title VI clearly does not apply directly to prohibit the Klan's discriminatory membership criteria. The Klan is not a direct recipient of federal funds nor are federal funds earmarked for the Klan. See National Collegiate Athletic Ass'n v. Smith, 525 U.S. 459, 468, 119 S.Ct. 924, 142 L.Ed.2d 929 (1999) ("Entities that receive federal assistance, whether directly or through an intermediary, are recipients within the meaning of Title IX;

entities that only benefit economically from federal assistance are not.") There is not even an allegation here that the State pays for the Adopt-A-Highway program with earmarked federal funds. The Klan thus is not subject to Title VI.

The question remains, however, whether Title VI prohibits the State from allowing the Klan to participate in the Adopt-A-Highway program. Under U.S. Department of Transportation regulations, the State, as a recipient of federal funds, "may not, directly or through contractual or other arrangements, on the grounds of race, color, or national origin ... [d]eny a person an opportunity to participate in the program through the provision of services or otherwise or afford him an opportunity to do so which is different from that afforded others under the program." 49 C.F.R. § 21.5(b)(1)(vi) (1999). The United States, as amicus curiae, argues that, in allowing the Klan to adopt a highway, the State would violate the regulatory prohibition on any arrangement that bars individuals from participating in a program on the basis of race. In essence, the United States argues that allowing the Klan to adopt a portion of highway would deny other people an opportunity to pick up litter on that portion of the highway on the same terms as the Klan. Once again, we note that the Klan's adoption of a highway does not in

> any way prohibit others from cleaning along that portion of the highway. But more to the point, we believe the United States interprets the "program" at issue too narrowly. Neither the Klan not the State would operate a subprogram on the Klan's adopted stretch of highway; instead, the Klan simply would be one of many participants in the overall Adopt-A-Highway program. So long as the State does not deny anyone an opportunity to adopt a highway on an improper basis, the State does not violate Title VI. The Klan, as one of many voluntary participants in the program, is free to determine its own membership.

Id. At 710-11.

Because the both Klan's discriminatory membership regulation and the Title VI argument have already been litigated in Cuffley, which resulted in a final adjudication on the merits, and because the Commission had a full and fair opportunity to be heard on these identical issues, I will apply offensive collateral estoppel and grant summary judgment to plaintiffs on these claims.

Judicial Notice Regulation

The Commission also relies on the new judicial notice of violence regulation to deny the Klan's application. The Klan seeks the benefits of collateral estoppel on this issue as well. Addressing the 1995 regulation, the Eighth Circuit in Cuffley stated in part:

The State's second purported reason, that the Klan has a history of unlawfully violent and criminal behavior, is based on another of the State's new regulations: "Applicants with a history of unlawfully violent or criminal behavior will prohibited from participation in the program." Mo. Code. Regs. Ann. tit. 7, § 10-14.030(2)(C). All of the evidence, however, supports the Klan's contentions that this reason is pretextual.

As we read the regulation, anyone who has ever committed a criminal act, from murder and mayhem to joyriding and jaywalking, is ineligible to participate in the program. Were the State actually to enforce this regulation with any regularity, we have little doubt the Adopt-A-Highway program would soon have few adopters.

* * *

. . . That the State does not know how the regulation applies in practice to the Adopt-A-Highway program is not surprising because the State has never applied the regulation to anyone other than the Klan. Even though the regulation became effective in July 1995, barely a year after the Klan filed its application, the State has never asked an applicant a single question about criminal history, has never done a single investigation of criminal history, and has no idea whether any of the participants in the program

> have such a history. At oral argument, the State backed further away from the incredible breadth of the regulation, arguing that it was intended to address violent criminal behavior such as that committed by the Klan in the past. The State's argument makes even clearer what was already obvious: that this regulation was intended to target only the Klan and its views.

Cuffley, 208 F.3d at 710.

After reviewing the Commission's regulations, I will decline the Klan's invitation to apply collateral estoppel to the judicial notice regulation. Under the 2001 regulation, an eligible adopter is one "for whom state or federal courts have not taken judicial notice of the history of violence." This provision attempts to narrow the "incredible breadth" of the 1995 regulation, and therefore the issues are not identical. Since the regulations are not the same, the Commission did not have a full and fair opportunity to litigate this issue in Cuffley, and collateral estoppel does not apply.

Instead, I must determine whether the judicial notice reason given by the Commission unconstitutionally violates the Klan's First Amendment rights. The First Amendment, applied to the states through the due process clause of the fourteenth Amendment, see 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 496 n.1 (1996), guarantees the right of freedom of speech to individuals and groups. See U.S. Constit. amend. I. The amendment's prohibition against abridging speech extends to expressive conduct, as long as that conduct

is "sufficiently imbued with elements of communication." Texas v. Johnson, 491 U.S. 397, 404 (1989).

The Supreme Court has articulated a three-step framework to be used when analyzing restrictions on private speech on government property. Cornelius v. NAACP Legal Def. & Educ. Fund., Inc., 473 U.S. 788 (1985). First, the court must determine whether the speech at issue is protected by the First Amendment. Id. at 797. If the speech is protected, the court must then identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic." Id. Third, the court "must assess whether the justifications for the exclusion from the relevant forum satisfy the requisite standard." Id.

Turning to the first step, I find that the Klan's desired participation in the Adopt-A-Highway program is "speech" protected by the First Amendment. See Cuffley v. Mickes, 44 F.Supp. 2d 1023, 1026 (E.D. Mo. 1999); Missouri, ex rel. Missouri Highway and Transp. Comm'n v. Cuffley, 927 F.Supp 1248, 1254-55 (E.D. Mo. 1996). "Nonverbal conduct constitutes speech is it is intended to convey a particularized message and the likelihood is great that the message will be understood by those who view it, regardless of whether it is actually understood in a particular instance in such a way." Burnham v. Ianni, 119 F.3d 668, 674 (8th Cir. 1997) (en banc).

Participants in the Adopt-A-Highway program intend to convey a particular message to the traveling public by adopting a particular section of a state highway. The Commission previously admitted that

participants seek to participate in the Adopt-A-Highway program in order to have their names on a sign and to promote community awareness of their organizations. Although the Commission questions the Klan's actual message and motive in seeking to participate in the Adopt-A-Highway program, I find the Klan's speech is constitutionally protected.

The second step in this analysis is to identify the nature of the forum. It is fundamental that the "existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue." Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983). In Perry, the Supreme Court described three categories of public fora: (1) the traditional public forum; (2) the designated or limited public forum; and (3) the nonpublic forum. Families Achieving Independence and Respect v. Nebraska Dep't of Soc. Servs., 111 F.3d 1407, 1418 (8th Cir. 1997) (en banc).

Traditional public fora are "places which by long tradition or by government fiat have been devoted to assembly and debate." Perry, 460 U.S. at 45. Examples of traditional public fora include streets, parks, town squares, and public sidewalks, which have "immemorially been held in trust for the use of the public and, time out of mind, 'have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" Id. (quoting Hague v. CIO, 307 U.S. 496, 515 (1939)). Traditional public fora receive the greatest degree of constitutional protection. See Burnham v. Ianni, 119 F.3d at 675.

The second category of government property is the designated public forum, which the state has opened to the public for expressive activity. Perry, 460 U.S. at 46. "The Constitution forbids a state to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place." Id. Examples of designed public fora include university meeting facilities, school board meetings, and municipal theaters, which have been designed for more limited purposes or discussions. Id. at 45-46. So long as a state maintains a forum that is generally open tot he public, it is "bound by the same standards as apply in a traditional public forum." Id. at 46.

The third category under Perry is the nonpublic forum, which consists of all other public property that is not by tradition or designation a forum for public communication. Families, 111 F.3c at 1419. This type of forum consists of property usually incompatible with expressive activity. Examples of nonpublic fora include prisons, military reservations, and a school district's internal mailing system. Cornelius, 473 U.S. at 803-804. These nonpublic fora are governed by less restrictive standards. See Perry, 460 U.S. at 46 (noting that "the State, no less than a private owner of property, has the power to preserve the property under its control for the use to which is was lawfully dedicated").

The parties here disagree about what the forum is, as well as whether that forum – whatever it is – is public, non-public, or something in between. Courts considering Adopt-A-Highway programs have similarly disagreed. Cf. State of Texas v. Knights of the Ku Klux Klan, 58 F.3d 1075, 1078 (5th Cir. 1995) (Texas Adopt-

A-Highway Program itself is the forum, and is non-public); State of Missouri, ex rel., Missouri Highway and Transportation Comm'n v. Cuffley, 927 F.Supp. 1248, 1257 (E.D. Mo. 1997) (highway right-of-way is the forum, and is probably designated public forum); Cuffley v. Mickes, 44 F.Supp.2d 1023, 1026 (E.D. Mo. 1999) (neither the program nor the highway is a public forum, but the program is itself a non-public forum); Knights of Ku Klux Klan v. Arkansas State Highway and Transportation Dept., 807 F.Supp. 1427, 1434 (W.D. Ark. 1992) (highway rights of way are a traditional public forum). It is unnecessary for me to decide whether the forum at issue is the program or the highways, because from the undisputed evidence it is clear that the Commission has not designated either the Adopt-A-Highway program or the highway roadsides as a public forum.

Courts need to look "to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum." Cornelius, 473 U.S. at 802. I find that the undisputed facts demonstrate that the Commission attempted to create a nonpublic forum rather than a traditional or designed forum. First, the Commission plainly states in the regulations that the "program is not intended as a means of providing a public forum for the participants to use in promoting name recognition or political causes. Missouri highway right-of-way is not a public forum." Mo. Code Reg. Ann. tit. 7, § 10-14.010(3). Second, the shoulders of highways are certainly not traditional public fora, such as streets or parks. The Commission retains tight control over access to the highway rights-of-way and to the Adopt-A-Highway program itself. I agree with

reasoning of Judge Limbaugh (in the second Cuffley case decided by this court) when he stated that:

> The Court finds that the [Commission] does not presently intend to open the shoulders of the Missouri state and interstate highway system for the purposes of traditional discourse. Rather, the [Commission] has developed a scheme to have litter removed from the roadsides cheaply by utilizing free labor. This program creates an extremely narrow outlet for ancillary expression, strictly limited to the participant's name and the fact of his, her or its participation. The [Commission] maintains tight control over both the program itself and the attendant opportunity for expression it creates. The [Commission] provides the garbage bags for the volunteers, and it strictly limits what they may place on the signs which the [Commission] erects in recognition of their efforts. The state maintains strict control over both the method of speech (placement of the sign and the act of participation) and the message itself (the simple fact of the group's participation in the program).

Cuffley v. Mickes, 44 F. Supp. 2d at 1027. Because the shoulders of highway and the Adopt-A-Highway program are not public fora, I will apply the nonpublic forum standard to the Commission's judicial notice regulation.

When government property is a nonpublic forum, regulations must be reasonable and "not an effort to suppress expression merely because public officials oppose the speaker's view." United States v. Kokinda, 497 U.S. 720, 730 (1990) (quoting Perry, 460 U.S. at 46). "Control over access to nonpublic forums can be based on subject matter and speaker identity so long as the distinctions are reasonable in the light of the purpose served by the forum and are viewpoint neutral." Cornelius, 473 U.S. at 806. Thus, in a nonpublic, forum, the state may restrict access if: (1) the restriction is reasonable; and (2) the restricting is viewpoint neutral.

The Commission claims that it denied the Klan's application because thirty-two federal and state court cases, some dating back to the 1920s, have taken judicial notice of the Klan's history of violence. Indeed, even the Supreme Court recently chronicled the Klan's violent history in Virginia v. Black, 113 S.Ct. 1536 (2003). The Court stated that the Klan imposed "a veritable reign of terror" throughout the South by "whipping, threatening to burn people at the state, and murder." Id. at 1544. The Court noted that the "Klan used cross burnings as a tool of intimidation and a threat of impending violence" and that violence was an elemental part of the Klan. Id. at 1545.

The Commission may refuse to grant the Klan's application to adopt a section of Route 21 in Washington County, Missouri if the restriction on speech is reasonable. The reasonableness of the state's restriction of access to a nonpublic forum must be assessed "in the light of the purpose of the forum and all surrounding circumstances." Cornelius, 473 U.S. at 809. A court

should consider the forum's special attributes because the significance of the government interest must be assessed in relation to the characteristic nature and function of the nonpublic forum. Kokinda, 497 U.S. at 732.

According to its brief, the reason underlying the judicial notice regulation is the Commission's concern about liability. The Commission argues that allowing the Klan to participate in the Adopt-A-Highway program could make it liable to others because of the Commission is responsible for dangerous conditions on the highway rights-of-way for which it has reasonable notice. Interestingly, the Commission does not assert that the Klan wishes to intimidate or threaten users of the highway system. Rather, the Commission seems more concerned with the "Klan's response to taunts, jeers, or insults hurled at the group by those who do not agree with its position." The Commission argues that an injured person would have a cause of action against the Commission.

This argument is similar to that made by the Missouri Department of Revenue ("the DOR") in Lewis v. Wilson, 253 F.3d 1077 (8th Cir. 2001). In Lewis, the DOR decided not to reissue a motorist a Missouri license plate with the letters "ARYAN-1" because it was contrary to public policy as set forth under a statute. Id. at 1078-79. The motorist filed suit in federal court. The DOR asserted that the motorist's license plate could be regulated because it was likely to provoke a violent response. Id. at 1081. "According to the DOR, drivers who are exposed to the 'ARYAN-1' plate may become angry, resulting in road rage and thus creating a traffic hazard." Id.

While the Eighth Circuit did not disagree that road rage was a conceivable consequence of the license plate, the court rejected the DOR's attempt to censor the motorist's speech because of the potential response of other drivers. Id. at 1082. Without evidence that any motorist had intentionally sought to provoke a violent reaction, the court stressed "the mere possibility of a violent reaction to [the motorist]'s speech is simply not a constitutional basis on which to restrict her right to speak." Id. at 1081. This "argument amounts to little more than the self-defeating proposition that to avoid physical censorship of one who has not sought to provoke such a response by a hypothetical coterie of the violent and lawless, the States may more appropriately effectuate that censorship themselves." Id. at 1081-82 (quoting Cohen, 403 U.S. at 23).

I Find Lewis to be instructive in this case. The Commission has offered no evidence to show that the Klan has intentionally sought to elicit a violent response or has directed at a particular individual so-called "fighting words." Unlike in State of Texas v. Knights fo the Ku Klux Klan, there is not allegation that the Klan is attempting to intimidate certain people or interfere with the compliance of a court order. In addition, the summary judgment evidence does not support a finding that resident of the area would be reluctant to use Highway 21 or would provoke a violent response from the Klan, even if the Klan were present gathering trash.

Moreover, the Commission's fear of liability is undermined by the indemnity provision found in the regulations. If allowed to adopt a highway, the Klan

would have to agree to indemnify the Commission from any claim, lawsuit, or liability which may arise from its participation in the Adopt-A-Highway program. Therefore, the Commission's concerns are unfounded. Instead, they only serve to add credibility to the Klan's pretext argument. The Klan's contention that the judicial notice regulation is simply a pretext to prevent its participation in the program is also bolstered by the fact that no other organization's application has been denied based upon this regulation.

While I do not disagree that some users of the state highway system may voice their displeasure with the Klan and its unfortunate views of racial superiority, it is unconstitutional to deny its application based on what hypothetically might occur when the Klan is picking up trash. Even if I assume that the Commission made no judgment about the viewpoint of the Klan's speech – although there is evidence that suggests the Klan's views were considered – the Klan's application cannot be denied for the reason alone. The First Amendment "knows no heckler's veto." Lewis 253 F.3d at 1082.

Based on the undisputed evidence, I find that the judicial notice regulation, as applied to the Klan, is not reasonable in light of the purpose of the Adopt-A-Highway program, which is to reduce litter along the highways and beautify Missouri's roadsides. The Klan's expressive speech of picking up trash along a highway right-of-way cannot be trumped because some people may disagree with its beliefs and advocacy, especially when the Klan agrees to indemnify the Commission. Even "those with viewpoints as thoroughly

obnoxious as those of the Klan" are entitled to First Amendment protection. See Cuffley, 208 F.3d at 711.

For the above reasons, I will grant the Klan's motion for summary judgment and enter a declaratory judgment in its favor.

Accordingly,

IT IS HEREBY ORDERED that plaintiffs' motion for summary judgment [#35] is granted.

IT IS FURTHER ORDERED that defendants' motion for summary judgment [#39] is denied.

A separate declaratory judgment in accord with this Memorandum and Order is entered this same date.

CATHERINE D. PERRY
UNITED STATES DISTRICT JUDGE

Dated this 10th day of September, 2003.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

THOMAS ROBB, et al.,)
)
Plaintiffs,)
)
v.) Case No. 4:01CV1133 CDP
)
HENRY HUNGERBEELER, et al.,)
)
Defendants.)

DECLARATORY JUDGMENT

In accordance with the Memorandum and Order entered this same date,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that plaintiffs shall have summary judgment.

IT IS FURTHER DECLARED that defendants are hereby enjoined from denying the application of the Knights of the Ku Klux Klan, Realm of Missouri, Unit 188, to participate in the Adopt-A-Highway program on the basis of Mo. Code Reg. Ann. tit. 7, § 10-14.030.

CATHERINE D. PERRY
UNITED STATES DISTRICT JUDGE

Dated this 10th day of September, 2003.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 03-3547

Thomas Robb; Knights of the Ku Klux Klan, an Arkansas Corporation; Ralph Griffith; Knights of the Ku Klux Klan Realm of Missouri, Unit 188, an unincorporated association,	*
Appellees,	* Appeal from the United States District Court for the Eastern District of Missouri.
v.	*
Henry Hungerbeeler, in his official capacity as Director of the Missouri Highways and Transportation Commission; S. Lee Kling; Edward D. Douglas; Ollie W. Gates; W. L. Orscheln; William E. Gladden; Marjorie B. Schramm, in their official capacities as commissioners of the Missouri Highway and Transportation Commission; Don Hillis, in his official capacity as State Maintenance Engineer,	*
Appellants.	*

Submitted: April 12, 2004

Filed: June 3, 2004

Before MORRIS SHEPPARD ARNOLD, RILEY, and COLLOTON, Circuit Judges.

MORRIS SHEPPARD ARNOLD, Circuit Judge.

Unit 188 of the Knights of the Ku Klux Klan, a Missouri-based chapter of a non-profit corporation that was chartered in Arkansas in 1994, applied to participate in Missouri's Adopt-A-Highway (AAH) program. Participants in the AAH program agree to collect litter along a specific portion of highway at least twice every six months, *see* Mo. Code Regs. Ann. tit. 7, § 10-14.040(2)(J) (2001), and in return the Missouri Highways and Transportation Commission (the State) installs signs bearing the name of the adopter at both ends of the adopted section, *see id.* at §§ 10-14.040 (3)(B), 10-14.050 (2001). After the State notified Unit 188 that its application was denied because it did not meet the AAH program's eligibility requirements that were set forth in state regulations, Unit 188, its unit coordinator, the Arkansas-based corporation, and that corporation's national director brought suit seeking declaratory and injunctive relief pursuant to 42 U.S.C. § 1983. The district court[2] granted the plaintiffs' motion for summary judgment, holding that the State's reasons for denying Unit 188's application were unconstitutional. *See Robb v. Hungerbeeler*, 281 F. Supp. 2d 989 (E.D. Mo. 2003).

---

[2] The Honorable Catherine D. Perry, United States District Judge for the Eastern District of Missouri.

The State appeals. It argues first that the district court erroneously concluded that it is collaterally estopped from litigating the constitutionality of its denial of Unit 188's application based on Unit 188's racially discriminatory membership criteria. Second, it maintains that the district court erred in holding that the State's application of a regulation barring participation in the AAH program by organizations for which courts have taken judicial notice of a history of violence violated Unit 188's first amendment rights, applied to the states through the fourteenth amendment.

Reviewing the district court's judgment *de novo*, we affirm.

I.

This is the third appeal to this court arising out of the State's ongoing efforts to keep Missouri Klan groups out of the AAH program. In the first case, *State of Mo. ex rel. Mo. Highway & Transp. Comm'n v. Cuffley*, 112 F.3d 1332, 1333 (8th Cir. 1997), the State, planning to deny a Klan group's application to participate in the program, filed an action seeking a declaratory judgment that it was not required to approve the application. We ordered the action dismissed, concluding that it involved neither a properly presented federal question nor a controversy that was ripe for review. *Id.* The State subsequently denied the group's application based, *inter alia*, on state regulations then in place that barred applicants that "discriminate on the basis of race, religion, color, national origin or disability" or that have "a history of unlawfully violent or criminal behavior." Mo. Code Regs. Ann. tit. 7, § 10-14.030 (1995). Another lawsuit ensued, and we affirmed the district court's grant of injunctive and

declaratory relief to the Klan group, holding that requiring the group to abandon its racially restrictive membership policy as a condition of participating in the AAH program violated its constitutionally protected right of political association, and that the State's other proffered rationale for denying the application – that the organization had a history of unlawfully violent or criminal behavior – was mere pretext for unconstitutional viewpoint-based discrimination. *See Cuffley v. Mickes*, 208 F.3d 702, 704, 708-10 (8th Cir. 2000) (*Cuffley II*), *cert. denied*, 532 U.S. 903 (2001).

In response to *Cuffley II*, the State made some minor changes to its regulations, and Unit 188 then submitted the application to participate in the program that is at issue here. The State, citing the amended regulations, *see* Mo. Code Regs. Ann. tit. 7, § 10-14.030(2) (2001), denied the application on the grounds that a so-called "judicial notice check" had purportedly confirmed that "courts have taken judicial notice of a history of violence by the Knights of the Ku Klux Klan," and the application revealed that the "group denies membership on the basis of race, color or national origin."

II.

The district court concluded that the State was collaterally estopped from litigating the propriety of excluding Unit 188 from the AAH program pursuant to the discriminatory membership regulation, because of our holding in *Cuffley II* that barring a Klan group from the program because of its discriminatory membership criteria was unconstitutional. "Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that

determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana v. United States*, 440 U.S. 147, 153 (1979).

For collateral estoppel purposes, the defendants here are functionally the same as those in *Cuffley II*. In both cases, several officials of the Missouri Highways and Transportation Commission were sued in their official capacities. Because "the real party in interest in an official-capacity suit is the governmental entity and not the named official," *Hafer v. Melo*, 502 U.S. 21, 25 (1991), "an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity," *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). In *Cuffley II* and here, the defendants represented the interests and positions of the Missouri Highways and Transportation Commission.

The plaintiffs in this case, however, were not parties in *Cuffley II*. The plaintiffs here are the unincorporated association "Knights of the Ku Klux Klan Realm of Missouri, Unit 188," the Arkansas corporation "Knights of the Ku Klux Klan," Thomas Robb (the national director of the Arkansas-based Klan corporation), and Ralph Griffith (the unit coordinator for Unit 188), whereas the plaintiffs in *Cuffley II* were a different Missouri branch of the Klan (which also operated under Mr. Robb's supervision, but was unrelated to Unit 188), and Michael Cuffley (a unit recruiter for the Klan). Where a plaintiff is seeking to estop a defendant from relitigating an issue which the defendant previously litigated and lost against another plaintiff, trial courts have broad discretion to determine whether

estoppel should be applied. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329, 331 (1979).

We held in *Cuffley II*, 208 F.3d at 708-09, that requiring the Klan group to refrain from racial discrimination constituted "an unconstitutional condition on the Klan's participation in the Adopt-A-Highway program." Our resolution of this legal issue was necessary to our judgment affirming the grant of summary judgment for that Klan group. We agree with the district court that the State is presently attempting to relitigate the same issue, which it had a full and fair opportunity to litigate in *Cuffley II*. We thus conclude that the district court properly exercised its discretion in applying an estoppel against the State.

The State urges us to hold that it is not estopped from litigating the issue of the legality of barring Unit 188 from the program based on its discriminatory membership criteria because the language of the regulation applied in the present case is slightly different from the language at issue in *Cuffley II*. Specifically, the regulation in *Cuffley II* required that participating organizations " 'not discriminate on the basis of race, religion, color, national origin or disability,' " *id.* at 708 (quoting Mo. Code Regs. Ann. tit. 7, § 10-14.030(2)(B) (1995)), while the regulation applied here allows organizations to participate only if they "do not deny membership on the basis of race, color, or national origin," Mo. Code Regs. Ann. tit. 7, § 10-14.030(2) (2001). The regulation's amendment failed to address the constitutional defects that we noted in *Cuffley II*, other than by deleting disability and religion from the list of prohibited bases for discrimination by AAH participants, and we think that the State's argument

that the issue presented in this case is somehow different because of these changes is wholly disingenuous.

In *Cuffley II*, we determined that "requiring the Klan to accept non-'Aryans' would significantly interfere with the Klan's message of racial superiority and segregation," *id.* at 708, and that the "State simply cannot condition participation in its highway adoption program on the manner in which a group exercises its constitutionally protected freedom of association," *id.* at 709. The State's newfound willingness to allow highway adopters to discriminate based on disability and religion does nothing to cure this infringement upon applicants' associational rights. The district court correctly observed that the new regulations "still allow the Commission to reject those applicants who discriminate in their membership criteria," and that the "Eighth Circuit has conclusively held that this violates the Klan's First Amendment right to freedom of association." *Robb*, 281 F. Supp.2d at 996; *cf. Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000). Even assuming that the issue arising out of the application of the present regulation to Unit 188 is not identical to the one that we decided in *Cuffley II*, and that collateral estoppel is thus inappropriate, *stare decisis* obligates us to apply the same principles that we applied in that case and hold that the State may not require that Unit 188 refrain from discriminating based on race in order to participate in the AAH program.

III.

A.

As we have already said, the State also argues that it lawfully barred Unit 188 from the AAH

program because Unit 188 did not meet the requirements of a regulation that limits the class of organizations eligible to participate in the program to those "for whom state or federal courts have not taken judicial notice of a history of violence." Mo Code Regs. Ann. tit. 7, § 10-14.030(2) (2001). We think that this argument rings hollow because the State has not shown that the regulation, by its own terms, applies to Unit 188. The regulation itself is vague, and the limits of its exclusion are unclear, but the State has failed to make any legitimate showing that Unit 188 violates its requirements, and this leads us to find that the State is using the regulation as a smokescreen to justify excluding Unit 188 because of its controversial political views.

Mr. Griffith completed and filed Unit 188's application for participation in the AAH program, indicating on the application that the request was being made on behalf of a group or organization, and in the space provided for the "full name and street address of the group or organization," he wrote "Knights of the Ku Klux Klan Unit #188" followed by an address in Potosi, Missouri. At the end of application, in the space labeled "Adopter Name," Mr. Griffith wrote "Knights of the Ku Klux Kl." The State contends that, for the purposes of the "history of violence" inquiry, the relevant entities are any groups that have ever used the name "Knights of the Ku Klux Klan" rather than Unit 188, or the Arkansas-based corporation that Unit 188 is affiliated with, specifically, and that any cases noticing historical violence by the "Knights of the Ku Klux Klan" are proper grounds for barring Unit 188 from the AAH program, whether or not those cases deal with Unit 188 or its members or affiliates. The parties have stipulated that a "judicial notice check" run by the State

found several "cases in which courts had taken judicial notice of a history of violence by the 'Knights of the Klu [*sic*] Klux Klan.' " They have also stipulated that the State is "unaware of whether Thomas Robb, Ralph Griffith, or Unit 188 has a history of violence," that the State's "judicial notice check" "revealed no court having ever taken judicial notice of a history of violence of Thomas Robb, Ralph Griffith, or any other members of Unit 188," and that it also "did not reveal any connection between Unit 188 and the group that had a history of violence."

It seems plain to us that the regulation's exclusion of organizations "for whom state or federal courts have ... taken judicial notice of a history of violence" cannot be reasonably construed to apply to organizations for whom no judicial notice of a history of violence has ever been taken, but who have a name that is similar or identical to that of an organization for whom such judicial notice has been taken. Over the course of many years, numerous organizations have used the words "Knights of the Ku Klux Klan" in their name. These different groups have had varying philosophies and proclivities for violence; some have been formally or informally affiliated with one another, while others have remained independent. In conducting its "judicial notice check," the State has made no effort to account for the widespread use of the name "Knights of the Ku Klux Klan" by groups of various kinds. Indeed, the State conceded during oral argument that it had little knowledge of the organizational structure of groups utilizing the name "Knights of the Ku Klux Klan." The mere fact that an applicant's organizational name includes certain widely-used language that has been used in the past by groups for which judicial notice has

been taken of having a history of violence is inadequate to demonstrate that the applicant itself violates the dictates of the regulation. There has been no individualized inquiry to confirm that, or even discern whether, Unit 188, Mr. Robb's Arkansas-based corporation, or any of the members of these organizations themselves have had the requisite judicial notice of a history of violence to trigger the application of the exclusionary regulation. Because the State's proffered reason for excluding Unit 188 lacks any sort of plausible evidentiary support, we think it manifest that the exclusion was motivated by the State's discriminatory animus against Unit 188's views.

B.

To the extent that the State has interpreted the regulation as allowing it to deny unit 188 access to the AAH program simply because it has chosen to adopt a name similar to that used by others who have had judicial notice taken of a history of violence, that interpretation violates our holding in *Cuffley II*, 208 F.3d at 706 n.3, that the State "may not deny access to the Adopt-A-Highway program based on the applicant's views." An organization's choice of name expresses a distinct message to the community about its character and views, and the type of "judicial notice check" that the State has purportedly applied here has denied Unit 188 access to the AAH program based solely on its name, without regard to whether judicial notice has ever been taken of Unit 188 itself or the Arkansas-based corporation it is affiliated with having a history of violence.

The principles announced by the Supreme Court in *Healy v. James*, 408 U.S. 169 (1972), are relevant

here. In *Healy*, a "local chapter" of Students for a Democratic Society (SDS) applied to obtain official campus recognition, and the students' college denied the application because the national SDS organization (which was divided into several factional groups, and was not affiliated with the local chapter), had a philosophy of "disruption and violence," which was "contrary to the approved policy" of the college. *Id.* at 174-75 & n.4. The student chapter, while remaining independent, had chosen to use the nationally known name because it "brings to mind the type of organization we wish to bring across," *id.* at 173 n.3. The Court held that the students' group could not be denied recognition solely because of the national organization's philosophy and history, stating that "guilt by association alone, without establishing that an individual's association poses the threat feared by the Government, is an impermissible basis upon which to deny First Amendment rights." *Id.* at 186 (internal quotations omitted). The State here has similarly infringed upon Unit 188's expressive and associational rights to the extent that it has denied it the ability to participate in the AAH program based on its choice of name and the conduct of other groups and individuals associated with that name.

C.

Even assuming that Unit 188 does not comply with the letter of the "history of violence" regulation, we conclude that the regulation is unconstitutional. In *Cuffley II*, 208 F.3d at 709-10, we observed that the regulation at issue barring all applicants with a "history of ... criminal behavior" had "incredible breadth," as it purported to exclude everybody "who has ever committed any criminal act, from murder and mayhem

to joyriding and jaywalking." Noting that the AAH program "would soon have few adopters" were the State to enforce the regulation with any regularity, and that it had in fact not been enforced with any regularity, we concluded that it had been employed "to target only the Klan and its views." *Id.*

The breadth of the present regulation is similarly problematic. Taken at face value, it bars organizations that have had historically committed violence that did not involve violating any laws, took place in the distant past, or was committed by deviant members no longer affiliated with the organization noticed by the courts. Under this regulation, football and hockey teams could be prohibited from adopting highways if they have ever been involved in litigation in which a court noticed the violence that inheres in those sports, *see, e.g., Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516, 520 (10th Cir. 1979), *cert. denied*, 444 U.S. 931 (1979). Many labor unions that have been embroiled in heated labor disputes could also be barred from the program. *See, e.g., Squillacote v. Local 248, Meat & Allied Food Workers*, 534 F.2d 735, 748 (7th Cir. 1976). Any organization affiliated with the Church of Jesus Christ of Latter-day Saints could be subject to exclusion based on judicial notice of the "Mountain Meadows Massacre," in which members of the Latter-day Saints church slaughtered non-Mormons traveling through Utah in the 1850's, *see Foremaster v. City of St. George*, 655 F. Supp. 844, 851 n.27 (D. Utah 1987), *rev'd*, 882 F.2d 1485 (10th Cir. 1989), *cert. denied*, 495 U.S. 910 (1990). Indeed, under the State's expansive interpretation of the regulation, any group affiliated with the Democratic or Republican parties could be ineligible to participate in the program based on judicial

notice of the debate over the adoption of the Minnesota constitution, during which "Republicans and Democrats exchanged not only ugly and racist epithets, but physical blows." *See State v. Wicklund*, 1997 WL 426209, at *5 (Minn. Dist. Ct. July 24, 1997), *rev'd*, 576 N.W.2d 753 (Minn. Ct. App. 1998), *aff'd*, 589 N.W.2d 793 (Minn. 1999).

In light of the substantial breadth of the regulation, the reasons advanced by the State in support of the regulation are insufficient to justify the restrictions on expression and association that it creates. Considering the purpose of the AAH program – "to provide volunteer community support for anti-litter and highway beautification programs with the potential for a cost savings to the Missouri Department of Transportation for use for other highway purposes," Mo. Code Regs. Ann. tit. 7, § 10-14.010(1) (2001) – there is simply no rationale for excluding the diverse array of groups from the program that the regulation permits the State to bar from participation.

If the State's goal is to enhance public safety by discouraging people who are presently involved in violent criminal activity from committing those acts on the highways, the regulation's sweep is clearly overinclusive. As we already noted, the regulation's exclusion is not limited to groups whose violent history is recent or criminal in nature. The State also may not censor AAH applicants' speech because of the potential responses of its recipients. "The first amendment knows no heckler's veto," and the State's desire to exclude controversial organizations in order to prevent "road rage" or public backlash on the highways against the adopters' unpopular beliefs is simply not a

legitimate governmental interest that would support the enactment of speech-abridging regulations. *See Lewis v. Wilson*, 253 F.3d 1077, 1081-82 (8th Cir. 2001), *cert. denied*, 535 U.S. 986 (2002).

The district court determined that, in establishing the AAH program, the State created a nonpublic forum, which is public property that is not by tradition or designation a forum for public communication. *See International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678-79 (1992). "In addition to time, place, and manner regulations, the State may reserve [a nonpublic] forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Families Achieving Independence and Respect v. Nebraska Dep't of Soc. Servs.*, 111 F.3d 1408, 1419 (8th Cir. 1997) (en banc). Speech restrictions relating to public fora are subject to more exacting scrutiny. *See id.* at 1418-19.

Whatever type of forum the AAH program (and the highways it takes place on) might be, the regulation at issue here is facially invalid because it sweeps too broadly with respect to any conceivable reasonable purpose that it might be designed to serve. If the regulation were enforced consistently and evenhandedly, the resultant burdens on speech would be unreasonable in light of the purposes served by the AAH program. Such an overly broad regulation, moreover, is likely to be applied selectively by the State; indeed, no organization other than Unit 188 has ever had its application denied based on this regulation. The timing of the regulation (it was promulgated in response to

our holding in *Cuffley II* that exclusion of a Klan group pursuant to a prior regulation was unconstitutional), and the fact that Unit 188 is the only group that it has ever been used to exclude, strongly suggests that it has been used as a pretext to target the Klan group in a viewpoint-discriminatory manner.

D.

The State contends that whether its exclusion of Unit 188 was the result of viewpoint-based discrimination is beside the point because the only speech that the AAH program implicates is that of the government itself. The government is allowed "to regulate the content of what is or is not expressed when it is the speaker." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995). In the State's view, the government "speaks" by composing and erecting the signs identifying the adopter, while the adopter itself engages in no protected speech by participating in the program, and thus the exclusion of Unit 188 pursuant to the regulation could not have abridged its freedom of speech.

The State's contention that it is entitled to engage in viewpoint-based discrimination because the AAH program involves only government speech is unavailing. It argues that this case is similar in relevant respects to *Knights of the Ku Klux Klan, Realm of Mo. v. Curators of the Univ. of Mo.*, 203 F.3d 1085 (8th Cir. 2000), *cert. denied*, 531 U.S. 814 (2000), in which we held that a publicly-owned radio station was not obligated to accept a Klan group's application to underwrite a radio program because the station's underwriting acknowledgments were government speech. In *Cuffley II*, 208 F.3d at 706 n.3, however, we

distinguished *Curators* as "rest[ing] largely on the unique context of public broadcasting, in which editorial discretion to select programming and sponsors looms large," and involving "absolutely no showing of viewpoint discrimination." We considered and rejected the argument that the State is entitled to discriminate based on applicants' viewpoints in *Cuffley II*, where we held that "the State may not deny access to the Adopt-AHighway program based on the applicant's views" whether or not the Klan was " 'speaking' for the purposes of the First Amendment." *Id.*

Participation in the AAH program, in any event, does entail some degree of private "speech" protected by the first amendment. The first amendment's prohibition against "abridging the freedom of speech," U.S. Const. amend I, applies not only to verbal expression, but also to symbolic or expressive conduct that is "sufficiently imbued with elements of communication," *Spence v. Washington*, 418 U.S. 405, 409 (1974). For example, the Supreme Court has suggested that participation in a parade by an Irish-American homosexual group is "expressive" for first amendment purposes. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569-70 (1995). "[A] narrow, succinctly articulable message is not a condition of constitutional protection." *Id.* at 569. We conclude that taking part in the AAH program, and receiving the attendant recognition on the signs is "sufficiently imbued with elements of communication" to constitute a form of private expressive conduct entitled to first amendment protection.

The fact that the AAH program involves some state speech that inheres in the signs' design (e.g., the

decision to display only the adopter's name, and no symbols, logos, or advertising, on the signs) does not eviscerate the expressive element of the adopters' election to participate in the program. In contrast to *Curators*, the editorial discretion exercised by the State in running the AAH program is minimal: there is scant creativity involved in producing the signs identifying the program participants, and the underlying purpose of the program is unrelated to the dissemination of governmental messages. Highway adopters, moreover, participate in the program in large part so that they can express a particular message: their solidarity with the community and their wish to become known as promoters of clean highways. Although the signs are state owned, an adopter speaks through the signs by choosing to undertake the program's obligations in exchange for the signs' announcement to the community that it is a highway adopter.

IV.

In sum, our holding in *Cuffley II* establishes that the State may not deny Unit 188's AAH application because it discriminates on the basis of race, and exclusion of Unit 188 pursuant to the "history of violence" regulation unconstitutionally restricts its expressive and associational rights. We thus affirm the district court's grant of the plaintiffs' motion for summary judgment.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 03-3547

Thomas Robb; Knights of the Ku Klux Klan, an Arkansas Corporation; Ralph Griffith; Knights of the Ku Klux Klan Realm of Missouri, Unit 188, an unincorporated association,	*
Appellees,	* Order Denying * Petition for * Rehearing and
vs.	* for Rehearing * En Banc
Henry Hungerbeeler, in his official capacity as Director of the Missouri Highways and Transportation Commission; S. Lee Kling; Edward D. Douglas; Ollie W. Gates; W.L. Orscheln; William E. Gladden; Marjorie B. Schramm, in their official capacities as commissioners of the Missouri Highway and Transportation Commission; Don Hillis, in his official capacity as State Maintenance Engineer,	*
Appellants.	*

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. (5128-010199)

July 30, 2004

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit

Mo. Rev. Stat. § 227.030 (2000). Construction and maintenance of highway system under supervision and control of commission.

1. The construction and maintenance of said highway system and all work incidental thereto shall be under the general supervision and control of the state highways and transportation commission, which is hereby authorized, empowered and directed to take whatever steps may be necessary to cause said state highway system to be constructed at the earliest possible time, consistent with good business management and funds available, after this chapter takes effect, and also to provide for the proper maintenance of said state highway system.

2. The state highways and transportation commission shall have power to make all final decisions affecting the work provided for herein and all rules and regulations it may deem necessary not inconsistent with this chapter for the proper management and conduct of said work and for carrying out all of the provisions of this chapter in such manner as shall be to the best interest and advantage of the people of the state.

3. The commission is hereby given power and authority to purchase, lease, or otherwise acquire and supply any tools, machinery, supplies, material and labor needed for said work and to pay for engineering, preparation of plans and specifications, cost of advertising, engineering supervision and inspection, and all expenses and contingencies in connection with the construction and maintenance of such state highway system.

Mo. Code Regs., tit. 7 § 10-14.010 Purpose

PURPOSE: This rule provides the purpose for the Adopt-A-Highway Program.

(1) The purpose of the Adopt-A-Highway Program is to provide volunteer community support for anti-litter and highway beautification programs with the potential for a cost savings to the Missouri Department of Transportation for use for other highway purposes.

(2) This program will reduce litter along the highways, enhance the environment and beautify Missouri's roadsides.

(3) The program is not intended as a means of providing a public forum for the participants to use in promoting name recognition or political causes. Missouri highway right-of-way is not a public forum.

AUTHORITY: section 227.030, RSMo 1994. [fn*] Original rule filed Feb. 15, 1995, effective July 30, 1995. Amended: Filed July 10, 2000, effective Jan. 30, 2001. [fn*] Original authority: 227.030, RSMo 1939.

Mo. Code Regs., tit. 7 § 10-14.020 Definitions

PURPOSE: This rule defines terms used in this chapter.

(1) Adopted section means a particular section of state highway right-of-way designated by the commission to be adopted by the volunteer individual or group participating in the Adopt-A-Highway Program.

(2) Adopter means the individual or group approved by the commission to be a participant in the Adopt-A-Highway Program.

(3) Adopter representative means a group member designated to represent the volunteer group and serve as its liaison with the commission. The adopter representative is the person who signs the agreement.

(4) Agreement means the written agreement between the volunteer individual or group adopting a section of highway right-of-way and the commission.

(5) Applicant means the individual or group applying for participation in the Adopt-A-Highway Program.

(6) Chief engineer means the chief engineer of the Missouri Department of Transportation or his/her authorized representative.

(7) Chief operating officer means the chief operating officer of the Missouri Department of Transportation or his/her authorized representative.

(8) Commission means the Missouri Highways and Transportation Commission, or its authorized representative.

(9) Department means the Missouri Department of Transportation.

(10) Director means the director of the Missouri Department of Transportation or his/her authorized representative.

(11) Litter means any unsightly matter that may include, but is not limited to, disposable packaging, containers, cans, bottles, paper and cigar or cigarette butts. Litter does not include hazardous, heavy or large items.

(12) Participant means any individual, including individuals within a group, who will be participating in the program activity.

(13) Program means the Adopt-A-Highway Program.

(14) Program activity means litter pickup and/or beautification and/or mowing.

(15) Signs mean the Adopt-A-Highway signs provided by the department.

(16) State maintenance engineer means the state maintenance engineer of the Missouri Department of Transportation or his/her authorized representative.

(17) Violent criminal activity means any offense having as an element the use, attempted use, or threatened use of physical force against the person or property of another or any offense involving weapons.

AUTHORITY: sections 226.130 and 227.030, RSMo 2000. [fn*] Original rule filed Feb. 15, 1995, effective July 30, 1995. Emergency amendment filed Feb. 8, 2000, effective Feb. 18, 2000, expired Aug. 15, 2000. Amended: Filed July 10, 2000, effective Jan. 30, 2001. Amended: Filed Jan. 7, 2002, effective Aug. 30, 2002.

[fn*] Original authority: 226.130, RSMo 1939, amended 1993, 1995, and 227.030, RSMo 1939.

Mo. Code Regs., tit. 7 § 10-14.030 Application for Participation

PURPOSE: This rule provides criteria for eligible adopters and application acceptance.

(1) The adopter or adopter representative of a group who desires to participate in the program shall submit an application to the commission on a form provided by the commission.

(A) An application completed by an individual on behalf of a group or organization must identify the group or organization for which the application is being submitted and failure to identify the group or organization on the application will result in rejecting the application.

(B) The adopter representative will certify on the application form that the group or organization does not deny membership on the basis of race, color, or national origin.

(2) Eligible Adopters. Eligible adopters include civic and nonprofit organizations, commercial and private enterprises and individuals:

(A) Who have not been convicted of, or pled guilty or no contest to, a violent criminal activity, except as provided below;

(B) Whose participants have not been convicted of, or pled guilty or no contest to, a violent criminal activity, except as provided below;

(C) For whom state or federal courts have not taken judicial notice of a history of violence; or

(D) Who do not deny membership on the basis of race, color, or national origin. Any individual adopter or participant may be eligible ten (10) years after the completion of any incarceration, probation or parole. Applicants who do not meet the eligibility requirements will be denied participation in the program. The commission reserves the right to limit the number of adoptions for a single group.

(3) Acceptance of Application. The state maintenance engineer and district engineer have the authority to approve applications of individuals or groups applying to participate in the program.

(4) Denial of Application. The director, chief engineer, chief operating officer, and state maintenance engineer are authorized to deny requests for participation in the program.

(A) A request for participation in the program may be denied if the applicant does not meet the eligibility requirements or has submitted false statement(s) of a material fact or has practiced or attempted to practice any fraud or deception in an application. Material facts include statements regarding convictions of violent criminal activity or membership qualifications.

AUTHORITY: sections 226.130 and 227.030, RSMo 2000. [fn*] Original rule filed Feb. 15, 1995, effective July 30, 1995. Emergency amendment filed Feb. 8, 2000, effective Feb. 18, 2000, expired Aug. 15, 2000.

Amended: Filed July 10, 2000, effective Jan. 30, 2001.
Amended: Filed Jan. 7, 2002, effective Aug. 30, 2002.

[fn*] Original authority: 226.130, RSMo 1939, amended 1993, 1995 and 227.030, RSMo 1939.

Mo. Code Regs., tit. 7 § 10-14.040 Agreement; Responsibilities of Adopter and Commission

PURPOSE: This rule provides terms of the written agreement between the adopter and the commission.

(1) If an application is approved by the commission, the adopter or adopter representative shall execute a written agreement with the commission, and upon signing by both parties, the agreement becomes effective and provides for the individual's or group's participation in the program.

(2) Responsibilities of Adopter. The adopter shall —

(A) Abide by all provisions contained in the agreement and any other terms and conditions as required by the department or commission;

(B) Provide to the commission, in writing, the name and complete mailing address, including street address, of the adopter representative and notify the commission within thirty (30) days of any change of the adopter representative's name or address;

(C) Abide by all safety requirements as listed in the department's safety brochure;

(D) Have the adopter, if the adopter is one individual, or the adopter representative attend a safety briefing conducted by the department and obtain safety meeting materials, including but not limited to a safety video, provided by the department, before participation in the initial program activity;

(E) Have all members of the group participating in the program activity attend a safety meeting conducted by the adopter representative that includes, but is not limited to, viewing the safety video provided by the department, before participation in the initial program activity;

(F) Have the adopter or adopter representative submit to the commission, in writing on a form provided by the department, the following information: 1) the name and street address of each participant; 2) a release of liability signed by each participant or parent or legal guardian of the participant if participant is a minor; 3) the participant's acknowledgement that he/she has attended a safety meeting and has viewed the safety video; and 4) if the participant is not a minor, the participant's statement that he/she has not been convicted of, or pled guilty or no contest to, a violent criminal activity;

(G) Properly use all safety equipment provided by the department and perform the work in a safe, responsible, and professional manner;

(H) Provide one (1) adult supervisor for every eight (8) participants between thirteen and seventeen (13-17) years of age and one (1) adult supervisor for every four (4) participants between six and twelve (6-12) years of age. No one under the age of six (6) will be allowed to participate in the program;

(I) Adopt a section of highway right-of-way for a minimum of three (3) years and submit a new application every three (3) years if the adopter wants to continue participation in the program;

(J) Collect litter along the adopted section a minimum of twice every six (6) months, or as required by the commission;

(K) Adopt for litter pickup a minimum of two (2) miles in rural areas and one-half (½) mile in urban areas. Shorter lengths may be permissible in special circumstances;

(L) Provide prior notice, as required by the commission before performing any program activity;

(M) Restrict program activities to the areas of right-of-way outside the pavement and shoulder areas;

(N) Perform program activity between the hours of one (1) hour after sunrise to one (1) hour before sunset and not during inclement weather;

(O) Prohibit participants from possessing, consuming, or being under the influence of alcohol or drugs while participating in the program activity;

(P) Place litter in trash bags provided by the department and place filled trash bags at a designated location;

(Q) Separate tires, batteries and other trash as needed for proper disposal according to local landfill requirements;

(R) Indemnify and hold harmless the commission and department and their officers, employees and agents from any claim, lawsuit or liability which may arise from adopter's participation in the program;

(S) Submit to the commission within five (5) working days of any program activity, the following information: 1) the adopter's name; 2) the date of the program activity; 3) the total hours involved in the program activity; and 4) the total number of bags of trash picked up. This information can be provided by calling or e-mailing the commission representative identified on the agreement, or by filling out and mailing the activity report form provided by the department. This information will enable the department to monitor the program's success;

(T) Not subcontract or assign its responsibilities under this program to any other enterprise, organization, or individual unless assignee is also an adopter and written approval has been given by the commission; and

(U) Not decorate or alter the signs.

(3) Responsibilities of Commission. The commission will —

(A) Determine the specific section of right-of-way that is to be adopted;

(B) Except as provided for in 7 CSR 10-14.050, install and maintain signs, if desired by the adopter, at both ends of the adopted section;

(C) Provide the adopter with trash bags;

(D) Provide a safety briefing and safety materials to the adopter which includes but is not limited to a safety video and safety brochure;

(E) Provide the adopter with safety equipment; and

(F) Remove and dispose of filled trash bags from the adopted section as soon as practical after the litter pickup is finished.

AUTHORITY: sections 226.130 and 227.030, RSMo 2000. [fn*] Original rule filed Feb. 15, 1995, effective July 30, 1995. Emergency amendment filed Feb. 8, 2000, effective Feb. 18, 2000, expired Aug. 15, 2000. Amended: Filed July 10, 2000, effective Jan. 30, 2001. Amended: Filed Jan. 7, 2002, effective Aug. 30, 2002.

[fn*] Original authority: 226.130, RSMo 1939, amended 1993, 1995 and 227.030, RSMo 1939.

Mo. Code Regs., tit. 7 § 10-14.050 Sign

PURPOSE: This rule provides the specifications of the signs used in the Adopt-A-Highway Program.

(1) The signs shall —

(A) Identify the adopter or, subject to the approval of the commission, may identify an individual in whose memory the adoption is being made;

(B) Be designed by the department as to size, color, and text; and

(C) Have the actual name of the adopter, or individual in whose memory the adoption is being made, with no telephone numbers, logos, slogans or addresses, including Internet addresses, with verbiage kept to a minimum.

(2) The signs shall not contain wording that is obscene, profane, or sexually suggestive or implies an obscenity, profanity or sexual content.

(3) Signs are not intended to be an advertising medium or serve as a means of providing a public forum for the participants.

(4) The signs shall not be altered or decorated by the adopter at any time.

(5) The erection of a sign is not a requirement for participation in the program. If, during the length of the agreement, a sign is damaged, destroyed, stolen, or removed from its foundation by an act of vandalism,

the department will provide and erect a single replacement sign at department cost. If the replacement sign is damaged, destroyed, stolen or removed from its foundation by an act of vandalism, the department will provide and erect a second replacement sign at department cost. If the second replacement sign is damaged, destroyed, stolen, or removed from its foundation by an act of vandalism, no further sign will be provided or erected.

(6) Two (2) signs will be erected for each adopter, one at each end of the adopted section, at a location determined by the department.

AUTHORITY: sections 226.130 and 227.030, RSMo 2000. [fn*] Original rule filed Feb. 15, 1995, effective July 30, 1995. Emergency amendment filed July 10, 2000, effective July 20, 2000, expired Nov. 17, 2000. Amended: Filed July 10, 2000, effective Jan. 30, 2001. Amended: Filed Jan. 7, 2002, effective Aug. 30, 2002.

[fn*] Original authority: 226.130, RSMo 1939, amended 1993, 1995 and 227.030, RSMo 1939.

Mo. Code Regs., tit. 7 § 10-14.060 Modification or Termination of the Agreement

PURPOSE: This rule provides for the commission to terminate or modify the program agreement.

(1) The agreement may be modified or terminated at the discretion of the director, chief engineer, chief operating officer, or state maintenance engineer.

(2) The director, chief engineer, chief operating officer, and state maintenance engineer reserve the right to terminate the program agreement and remove the signs when it is found that:

(A) Continuing the agreement would be counterproductive to the program's purpose, or have undesirable results such as increased litter or vandalism or would jeopardize the safety of the participants, traveling public or department employees;

(B) The adopter is not meeting or has not met the terms and conditions of the agreement or any of the requirements set forth in 7 CSR 10-14.030-7 CSR 10-14.050; or

(C) Actions of the adopter may be contrary to any legislative restrictions or any restrictions on the use of appropriated funds for political activities.

(3) After three years of participation in the program, an adopter may terminate the agreement upon written notice to the commission.

AUTHORITY: sections 226.130 and 227.030, RSMo 2000. [fn*] Original rule filed July 10, 2000, effective Jan. 30, 2001. Amended: Filed Jan. 7, 2002, effective Aug. 30, 2002.

[fn*] Original authority: 226.130, RSMo 1939, amended 1993, 1995 and 227.030, RSMo 1939.